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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1946

No. 690

INSURANCE GROUP COMMITTEE, REORGANIZATION COMMITTEE, GUARANTY TRUST COMPANY OF NEW YORK, TRUSTEE, ET AL., PETITIONERS,

vs.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 12, 1946.

CERTIORARI GRANTED DECEMBER 16, 1946.

UNITED STATES CIRCUIT COURT OF APPEALS
TENTH CIRCUIT
No. 3425

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, Debtor, and THE DENVER AND SALT LAKE WESTERN RAILROAD COMPANY, Subsidiary Debtor,

vs. *Appellants,*

JOHN EVANS, J. F. FITZPATRICK, HARVEY J. GUNDERSON, RICHARD K. PAYNTER, JR., and EUGENE A. SCHMIDT, JR., Reorganization Committee under the Plan of Reorganization of The Denver and Rio Grande Western Railroad Company, Debtor; WILSON McCARTHY and HENRY SWAN, as Trustees of the property of The Denver and Rio Grande Western Railroad Company; H. ALLYN HICKS, JR., as Trustee of the property of The Denver and Salt Lake Western Railroad Company; UNITED STATES TRUST COMPANY OF NEW YORK; CHASE NATIONAL BANK OF THE CITY OF NEW YORK; GUARANTY TRUST COMPANY OF NEW YORK; CITY BANK-FARMERS TRUST COMPANY; CENTRAL HANOVER BANK AND TRUST COMPANY; INSURANCE GROUP COMMITTEE; RECONSTRUCTION FINANCE CORPORATION; MOFFAT TUNNEL IMPROVEMENT DISTRICT AND COMMISSION; THE STATE OF COLORADO; AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO.

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United States Circuit Court of Appeals

TENTH CIRCUIT

No. 3425

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, Debtor, and THE DENVER AND SALT LAKE WESTERN RAILROAD COMPANY, Subsidiary Debtor,

Appellants,

vs.

JOHN EVANS, J. F. FITZPATRICK, HARVEY J. GUNDERSON, RICHARD K. PAYNTER, JR., and EUGENE A. SCHMIDT, JR., Reorganization Committee under the Plan of Reorganization of The Denver and Rio Grande Western Railroad Company, Debtor; WILSON McCARTHY and HENRY SWAN, as Trustees of the property of The Denver and Rio Grande Western Railroad Company; H. ALLYN HICKS, JR., as Trustee of the property of The Denver and Salt Lake Western Railroad Company; UNITED STATES TRUST COMPANY OF NEW YORK; CHASE NATIONAL BANK OF THE CITY OF NEW YORK; GUARANTY TRUST COMPANY OF NEW YORK; CITY BANK-FARMERS TRUST COMPANY; CENTRAL HANOVER BANK AND TRUST COMPANY; INSURANCE GROUP COMMITTEE; RECONSTRUCTION FINANCE CORPORATION; MOFFAT TUNNEL IMPROVEMENT DISTRICT AND COMMISSION; THE STATE OF COLORADO; AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO.

FILED: Oct. 30, 1948. ROBERT B. CARTWRIGHT, Clerk.

[fol. 3]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO SITTING AT DENVER.

Pleas and Proceedings before The Honorable J. Foster-Symes, Judge of the United States District Court for the District of Colorado, presiding in the following entitled cause:

In the Matter of
8669 In Bankruptcy

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, Debtor, and

THE DENVER AND SALT LAKE WESTERN RAILROAD COMPANY, Subsidiary Debtor.

PETITION OF THE DEBTOR FOR AN ORDER OF THIS COURT (a) VACATING AND SETTING ASIDE ITS ORDERS OF OCTOBER 25, 1943 AND NOVEMBER 29, 1944, APPROVING AND CONFIRMING THE PLAN OF REORGANIZATION CERTIFIED TO IT BY THE INTERSTATE COMMERCE COMMISSION AND (b) REFERRING THIS PROCEEDING BACK TO THE INTERSTATE COMMERCE COMMISSION FOR THE FORMULATION OF A NEW PLAN UNDER SUBSECTION (d) OF SECTION 77 OF THE NATIONAL BANKRUPTCY ACT.

The Denver and Rio Grande Western Railroad Company, the Debtor in this proceeding (herein called the Debtor) files this Petition pursuant to the authority vested in it by Section 77 of the National Bankruptcy Act and hereby represents to the Court as follows:

1. This Petition is filed by the Debtor in its corporate capacity both in its own right and as the representative of its creditors and stockholders to the extent that they are not otherwise lawfully and fully represented herein and without limiting the generality of such representation it specifically asks relief (a) on behalf of the holders of its General Mortgage Bonds, if by reason of the limitations of Section 77 of the National Bankruptcy Act they may not be lawfully and fully represented in this proceeding by City

Bank Farmers Trust Company as Mortgage Trustee; (b) on behalf of its general or unsecured creditors; and (c) on behalf of the holders of its Preferred Stock and Common Stock.

2. In filing this Petition the Debtor invokes the equity [fol. 4] powers of this Court as a Court of Bankruptcy and the equity powers expressly granted it in proceedings under Section 77 of the National Bankruptcy Act by the provisions of Subsection (a). The vital equity power hereby invoked is the power to do justice to any and all parties in interest at any stage of the proceeding and to prevent the entry of, or to vacate and set aside, a decree or determination which may be unfair, inequitable or unjust by reason of the discovery of new evidence or by reason of changed circumstances or a fundamental alteration of economic conditions or by reason of any new factor or substantial change of a former situation or status which causes such decree to be one of doubtful propriety and calculated to disturb and distress the conscience of the Court. In the Opinions of the Supreme Court of the United States rendered March 15, 1943, in the case of *Ecker* v. *Western Pacific Railroad Corporation and others,* (318 U. S. 448) and in the case of *Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul and Pacific Railroad Company* (318 U. S. 523) and also in the Opinion of the Supreme Court of the United States rendered June 10, 1946, in the proceeding in which this Petition is filed it is recognized that a change in economic conditions may require a reexamination into the present fairness of a Plan of Reorganization previously formulated by the Interstate Commerce Commission and approved or confirmed by the Court.

3. By order or decree dated October 25, 1943, this Court approved, and by order or decree dated November 29, 1944, confirmed a Plan of Reorganization for the Debtor which had been certified to it by the Interstate Commerce Commission on June 14, 1943, and which was based upon a record formally closed on May 20, 1941. In the period between May 20, 1941, when the record in this proceeding [fol. 5] was closed by the Interstate Commerce Commission, and August 13, 1946, when the President of the United

States published the Memorandum of Disapproval of S. 1253 which had been presented to him on August 1, 1946, pursuant to Section 7 of Article I of the Constitution of the United States, there have occurred in the United States of America and in the section or territory thereof served by the railways and facilities of the Debtor a series of changes in the National economy, in the railway industry and in the earning power of the Debtor's properties and in legislative and executive action since the confirmation of the Plan interpretative of what is "fair, equitable and in the public interest", which have completely undermined the foundation and the philosophy of the Plan of Reorganization for the Debtor certified by it to this Court on June 14, 1943, and in consequence thereof said Plan is not now, if ever it was, a fair and equitable Plan conforming to the standards and requirements prescribed by Section 77 of the National Bankruptcy Act.

4. The Petitioner, without limiting or restricting the scope of this Petition as embracing all changes in the National economy and in the railway industry and in the earning power of the Debtor's properties, hereby specifies the following as factors which should be fully explored in an open hearing before finality may properly be accorded a Plan of Reorganization for the Debtor formulated as early as June 14, 1943 upon a record closed as early as May 20, 1941:

(a) The decline in money rates to a level far below the rates prevailing at these dates;

(b) The recent public offering by the Government and purchase by private capital for private operation of the steel plant at Geneva, near Provo, Utah, which had been constructed by the Government in the exigencies of the War at a cost in excess of $200,000,000;

(c) A permanent elevation of the National income [fol. 6] through intensified industrial activity involving for the indefinite future a greatly increased demand for railway transportation.

Each of these factors which will be elaborated in its order under a distinguishing caption alone is sufficient to render

obsolete, unfair, inequitable and unjust a Plan of Reorganization developed on the basis of pre-war standards and pre-war data and that taken collectively they create a presumption of obsolescence so nearly conclusive that a Court of Equity could not properly ignore it.

(*A*) *Decline in money rates:* In order properly to appraise the impact of the decline in money rates it is necessary to give the legislative background of the President's Memorandum of Disapproval dated August 13, 1946 of the relief measure, S. 1253, commonly known as the Wheeler-Reed Bill. As heretofore alleged the Supreme Court of the United States on March 15, 1943 had rendered the two decisions cited above approving Plans of Reorganization promulgated under Section 77 of the Bankruptcy Act which declared worthless all of the equity capital invested in the several properties and made only partial provision for the indebtedness secured by the junior mortgage liens. These Plans were based upon assumed values certified by the Interstate Commerce Commission as reflecting the capitalization at an undisclosed rate of estimated future income in amounts likewise undisclosed. Legislation shortly thereafter was introduced in the House of Representatives by a member of the Judiciary Committee to correct the misinterpretation placed upon Section 77 of the Bankruptcy Act by the Interstate Commerce Commission and sustained by the Supreme Court of the United States which made possible the alarming forfeitures of private capital occurring in the railway industry. This legislation was merged into or was superseded by S. 1253, a measure agreed upon in conference by the Senate and House of Representatives [fol. 7] and adopted on July 31, 1946 and presented to the President of the United States on the following day pursuant to Section 7 of Article I of the Constitution. This unusual and drastic action on the part of Congress was the result of intensive study on the part of the Interstate Commerce Committee of the Senate and the Judiciary Committee of the House of Representatives. Reference is hereby made to Report No. 1615 H.R. Seventy-Eighth Congress, Second Session, on H.R. 4960; Report No. 48 H.R. Seventy-Ninth Congress, First Session H.R. 37; Report No. 1838 of the Seventy-Ninth Congress, Second

Session, on H.R. 5924; Report on S. Res. 192, Seventy-Ninth Congress, First Session, and S. Reports No. 925 and 1170 on S. 1253; Seventy-Ninth Congress, First Session, and to the Hearings on H.R. 4779 afterwards renumbered H.R. 5924 and the Hearings on S. 1253. From these public records it will be made clear to this Court that Congress definitely and after due deliberation has refused to accept as in accord with the true intent of Section 77 or as legally sound or morally and economically admissible the forfeiture policy of the Interstate Commerce Commission underlying the reorganizations which have been carried into effect under the decisions of the Supreme Court of the United States rendered on March 15, 1943. From the President's Memorandum of Disapproval of the relief legislation as passed by Congress on July 31, 1946, the President has made it equally clear that included among his underlying objections were the attempted exclusion of the Denver and Rio Grande Western Railroad Company and the exclusion of other debtor roads from the remedial provisions of the Bill and the failure of Congress adequately to provide against future forfeitures and at the same time to make immediate provision for the refinancing by carriers in judicial custody of their outstanding Bonds bearing interest at rates long since obsolete. It had become apparent to the President that the favorable change in interest rates for railway Bonds could with legislative aid be availed of [fol. 8] *during* the administrative period of the proceeding to prevent the confiscation of valuable equities instead of being used as in other cases of which Chicago Northwestern Railway Company is typical to unduly fatten and enrich creditor groups to whom the equities are passing under the reorganization process.

On this point the President said:

> "The bill fails to direct specifically the immediate reduction of the grossly excessive interest rates now wasting the funds of railroads in Section 77 proceedings. Millions of dollars per year can be saved at once for each of the railroads in Section 77 proceedings by reducing interest rates on their bonds and other debt down to the level of interest rates paid by railroads not in Section 77 proceedings."

What the President visualized was a provision setting up machinery for refinancing of bonds bearing unduly high interest rates during the progress of the Section 77 proceeding and it is manifest that such a provision would be sound and salutary. But legislation is not needed to enable a Court of Equity to vacate and set aside its Orders approving and confirming a Plan of Reorganization if before the Plan is carried into effect the interest rates specified for the new capital structure have by reason of changed economic conditions became outmoded and obsolete. Since the date of the Order or Decree of this Court approving the Plan of Reorganization certified to it on June 14, 1943, by the Interstate Commerce Commission there have been a series of refinancing of railway securities demonstrating that the interest and dividend rates prescribed in the Plan are at a level far higher than can be justified by present day conditions. The following list is illustrative but by no means all inclusive:

[fol. 9]

Name	Date of Refinancing	Interest rate of old issue	Interest rate of new issue
Chicago, Burlington and Quincy R. R. Co.	Aug. 1-Dec. 1, 1944	4-5%	3½% 1½% 3¾%
Chicago and Northwestern Railway Co.	Jan. 1, 1945	4%	3%
Pennsylvania Railroad Company	Jan. 1, 1945	4½%	3⅛%
Pere Marquette Railroad Co.	Mar. 1, 1945	4-5%	3⅜%
Wabash Railroad Company	Feb. 1, 1945	4%	3¼%
Washington Terminal Co.	Feb. 1, 1945	3½-4%	2⅝%
Rio Railroad Co.	Jan. 1, 1945	4%	3⅛%
Erie Railroad Co.	Mar. 15, 1945	3⅛%	2%
Reading Company	Apr. 1, 1945	4-5%	3⅛%
New York Connecting R. R.	Oct. 1, 1945	3½%	2⅞%
Lehigh & New England R. R.	Nov. 1, 1945	4%	3%
Western Maryland Railway	Nov. 1, 1945	5½%	1¾%-3¼%
Pennsylvania Ohio and Detroit R. R. Co.	Oct. 1, 1945	3⅝%-4½%	2⅞%
Term. R. R. Ass'n of St. Louis	Oct. 1, 1945	3⅝%-4%	2⅞%

From the foregoing data it is manifest that a reduction averaging 1½% in interest and dividend rates for capital

structures set up prior to November 29, 1944 would be necessary to conform them to the present day security markets. This it must be emphasized is not a temporary condition—long term contracts—contracts fixing the new rates for terms running 30, 40 and 50 years underlie all of these refinancing operations. A reduction of 1½% in the interest and dividend rates prescribed in the obsolete Plan of Reorganization formulated for the Debtor in 1943 would involve an annual saving of $1,539,051 which if capitalized at 3½% would provide additional securities in the amount of $43,974,000—more than enough to make whole the holders of the Debtor's General Mortgage Bonds who under the obsolete Plan lose 90% of their investment.

(*B*) *The permanent establishment of the Geneva Steel Plant.* It is misleading to say, as did the proponents of this obsolete Plan of Reorganization in their presentation to the Supreme Court of the United States that the record of this proceeding shows knowledge on the part of the [fol. 10] Interstate Commerce Commission of the existence of the Geneva Steel Plant at Provo, Utah, at the time it certified the Plan to the District Court.

At the time the record in this proceeding was closed by the Interstate Commerce Commission the development of this great mid-continental steel plant if it had been considered at all was in the blueprint stage. Later on construction was undertaken by the United States Steel Corporation at the request of and for the account of the Government. A year or more afterwards in connection with an uncontested application of the Trustee of the Debtor's estate for leave to make certain interest payments there was a reference by one of the Trustees to this, among other, war projects. What was said was scarcely more informative than would have been the case if the reference had been to the construction of a new canal on the Planet Mars. (Transcript p. 995.) This incident is of value as revealing the quality of the evidence that has been resorted to in the Section 77 proceedings to sustain the forfeiture policy of the Interstate Commerce Commission. The Trustees of the Debtor's estate and the proponents of the Plan

of Reorganization have consistently treated this massive heavy goods industry as a war facility and not as a permanent industrial development upon which to base and measure peacetime traffic potentialities and this was perhaps technically admissible or justifiable at October 23, 1943, when this Court approved the Plan and at November 29, 1944, when this Court gave it final confirmation. It was unknown even at the latter date whether in the end the Plant would be closed down and written off as an expense item of the War or whether it would be sold as surplus property.

After the Plan of Reorganization had been confirmed by the Court the Government decided to offer the Plant for sale as surplus property and in the month of June 1946 the property was acquired by the United States Steel Corpora- [fol. 11] tion which is now in possession. The over-all purchase price is said to have been $47,500,000 plus an undertaking on the part of the purchaser to expend a minimum of $18,600,000 to adapt the Plant to the manufacture of steel products in addition to those for which it was originally constructed. These included structural steel and steel plates up to an annual capacity of 700,000-750,000 net tons. The Debtor submits that the permanent establishment of this mammoth Plant for peace-time ownership and operation by United States Steel Corporation necessarily destroys and renders worthless any estimate of the earning power of the Debtor's properties made at a time when the Plant did not exist and given judicial sanction at a time when it was not known whether the Plant would survive the exigencies of the War.

(*C*) *Post-war National income.* At the time the Plan of Reorganization which the Debtor seeks to set aside was confirmed by this Court the War had not ended either in Europe or in the Orient. There had been no scientific study of the peace-time economy that would be needed to service a National debt already at an undreamed of level and still rising. It was recognized when this proceeding reached the Circuit Court of Appeals that there would be

a post-war economy vastly different from that which existed when the Interstate Commerce Commission developed the Plans of Reorganization which have been subjected to such caustic criticism in the official Reports heretofore cited of the Interstate Commerce Committee of the Senate and the Judiciary Committee of the House of Representatives. The impending economic changes then in process and now a reality are featured in the Opinion of the Circuit Court of Appeals rendered by Judges Huxman and Phillips. It is now recognized that what was then thought to be a wild unrestrained guess as to the post-war National income was in fact a gross understatement. The reasonably anticipated gross income of Debtor's property for the year 1946 will be far in excess of any pre-depression income and on [fol. 12] the basis of any operating ratio heretofore experienced on the property there should be realized therefrom distributable income far in excess of any amount necessary for the service of Debtor's obligations. It is inconceivable that this Court sitting as a Court of Equity would permit the consummation of a Plan of Reorganization for this Debtor which wipes out 90% of the investment of the Debtor's General Mortgage Bonds (more than $43,000,000 if interest at contract rates is computed *pendente lite* without equitable adjustments), the entire investment in the Debtor's Preferred Stock (more than $17,000,000) and the equity investment in common shares held severally in equal proportions by the Missouri Pacific Railroad Company and the Western Pacific Railroad Corporation without opening wide the judicial doors for proof of the changed circumstances which demonstrate the injustices by which these interests are menaced.

WHEREFORE, the Petitioner respectfully prays for an Order of this Court vacating and setting aside its Orders entered herein on October 25, 1943 and November 29, 1944 approving the Plan of Reorganization for the Debtor certified to it by the Interstate Commerce Commission, referring this proceeding back to the Interstate Commerce Commission for the formulation of a New Plan of Reorganization conforming to the requirements under present-day conditions of Section 77 of the National Bankruptcy Act and

granting such other and further relief in the premises as to the Court shall seem meet.

Respectfully submitted,

/s/ William V. Hodges
William V. Hodges
Equitable Building
Denver 2, Colorado

/s/ F. C. Nicodemus, Jr.
F. C. Nicodemus, Jr.
40 Wall Street
New York 5, N. Y.

Attorneys for Petitioner, The Denver and Rio Grande Western Railroad Company

September 17, 1946

Filed United States District Court, Denver, Colorado, Sept. 17, 1946.

G. Walter Bowman,
Clerk.

[fol. 13] In the District Court of the United States for the District of Colorado,

No. 8669

In the Matter of The Denver and Rio Grande Western Railroad Company, Debtor.

In Proceedings for the Reorganization of a Railroad.

Motion of Insurance Group Committee and Senior Indenture Trustees in Regard to Debtor's Motion for Rehearing.

Insurance Group Committee, Central Hanover Bank and Trust Company, Trustee, Guaranty Trust Company of New York, Trustee, United States Trust Company of New York,

Trustee, and The Chase National Bank of the City of New York, Trustee, without admitting that any form of pleading is required with respect to the "Petition of the Debtor for an order of this Court (a) vacating and setting aside its orders of October 25, 1943, and November 29, 1944, etc." (hereinafter called the Motion for Rehearing), but solely to clarify the issues and reserving the right to amplify this motion at any argument or hearing thereon, move that the Court (1) defer any action on the Motion for Rehearing until the Supreme Court shall have acted on the petitions for rehearing now pending before it and, if and when such petitions shall have been denied, (2) enter an order, without receiving any evidence, which (*i*) will deny the Motion for Rehearing on the ground that it does not state a case of such nature as to justify reconsideration of the determinations heretofore made by said orders of October 25, 1943 (approving the Plan of Reorganization) and November 29, 1944 (confirming the Plan), and (*ii*) will grant to the undersigned such other relief as may be proper.

[fol. 14] With respect to (1) above, this Motion is made on the ground that it is not competent or proper for this Court to vacate or change said orders of October 25, 1943 (approving the Plan) or November 29, 1944 (confirming the Plan) until said petitions for rehearing shall have been disposed of by the Supreme Court. With respect to (2) above this Motion, subject to denial of said petitions by the Supreme Court, is made on the following grounds:

(*a*) The order of November 29, 1944 that confirmed the Plan, having so become final, conclusively determines all controversies as to the Plan and conclusively determines the participation of the various classes of security holders and the classes of security holders that shall or shall not participate, so that it is not now competent for the Debtor to reopen any of the issues so determined or for this Court to take any action requested in the Motion for Rehearing.

(*b*) In the alternative, if it be competent for the Debtor to request any reopening of the issues so determined, that could be done only by a Motion for Rehearing, addressed to the discretion of this Court and stating such a case as

would, at the least, make the denial of the motion unconscionable and inequitable. The Motion for Rehearing does not state such a case. On the contrary, considered in the light of:

(*i*) the opinion of this Court delivered October 25, 1943 approving the Plan, the order of October 25, 1943 approving the Plan, the opinion of this Court delivered November 1, 1944 confirming the Plan, the order of November 29, 1944 confirming the Plan and the tenor and effect of the appellate proceedings had thereon,

(*ii*) the whole record in these proceedings, including all papers heretofore filed herein, and

[fol. 15] (*iii*) the matters of which the Court may properly take judicial notice,

the Motion for Rehearing fails to state any such a case as to justify any reconsideration of the determinations heretofore made herein and it should therefore be summarily denied.

Dated October 23, 1946.

INSURANCE GROUP COMMITTEE

By Grant, Shafroth and Toll
Equitable Building
Denver 2, Colorado

Hunton, Williams, Anderson, Gay & Moore
Electric Building
Richmond 19, Va.

CENTRAL HANOVER BANK AND TRUST COMPANY

By Norma L. Comstock
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GUARANTY TRUST COMPANY OF NEW YORK

By Pershing, Bosworth, Dick & Dawson
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UNITED STATES TRUST COMPANY OF NEW YORK

By Lindsey & Larwill
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Denver 2, Colorado

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THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK

By Lewis & Grant
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New York 5, N. Y.

Filed United States District Court, Denver, Colorado, October 26, 1946. G. Walter Bowman, Clerk.

[fol. 16] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO,

No. 8669

In the Matter of THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, Debtor.

In Proceedings for the Reorganization of a Railroad.

ORDER DISMISSING PETITION OF DEBTOR FOR AN ORDER OF THIS COURT SETTING ASIDE ORDERS OF OCTOBER 25, 1943, AND NOVEMBER 29, 1944.

This matter having come on to be heard this day on the motion of Insurance Group Committee, filed October 25, 1946, to dismiss the Debtor's petition for rehearing entitled "Petition of the Debtor for an order of this court (a) vacating and setting aside its orders of October 25, 1943, and November 29, 1944, etc." (hereinafter sometimes referred to as "the Petition for Rehearing") and having been argued by counsel, and the Court being fully advised in the premises, and being of the opinion

(a) that the order of November 29, 1944, having become final, conclusively determines all controversies concerning the Plan and the rights of the various classes of security holders to participate, and it is not now competent for the Debtor to reopen those proceedings; and

(b) that the Petition for Rehearing fails to state a case which justifies reconsideration by this Court of the issues already determined;

it is

ORDERED that the Petition for Rehearing be, and it hereby is denied on each of the aforesaid grounds.

J. Foster Symes
United States District Judge

Dated at Denver, Colorado
this 30th day of October, 1946.

Filed United States District Court, Denver, Colorado. October 30, 1946. G. Walter Bowman, Clerk.

[fol. 17] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO,

No. 8669

In the Matter of THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, Debtor.

In Proceedings for the Reorganization of a Railroad.

MOTION OF DEBTOR FOR STAY OF EXECUTION OF THE PLAN OF REORGANIZATION HEREIN.

Comes now the Debtor herein and moves the Court to enter an Order staying all further action of any and all parties hereto in carrying out the Plan of Reorganization heretofore confirmed by this Court, including the expenditure of money for the purpose of executing the same, until such time as the appeal from the Order of this Court entered on the 30th day of October, 1946, denying the petition of the Debtor to remand said Plan to the Interstate Commerce Commission shall be taken within the time allowed by the applicable Rules of Procedure and shall have been passed upon by the Circuit Court of Appeals of the Tenth Circuit, and so long thereafter as may be required by the mandate of said Court of Appeals.

That an appeal to the Circuit Court of Appeals of the Tenth Circuit would be ineffective should the distribution of securities before and without consideration by the Interstate Commerce Commission of the changed factors alleged in Debtor's motion to remand the Plan to the Commission for further consideration be made before the disposition of such appeal by the Circuit Court of Appeals of the Tenth Circuit, and the damage to your petitioner would be irreparable. That immediately upon the issuance and delivery of the securities contemplated by the said Plan they may thereafter speedily pass from hand to hand and upon valid consideration and so be purchased by persons who would claim to be innocent purchasers thereof, and the re-

call thereof would involve multifarious claims and litigation [fol. 18] and be in large measure impossible.

Respectfully,

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, Debtor.

By William V. Hodges,
Henry C. Vidal,
947 Equitable Building,
Denver 2, Colorado.

F. C. Nicodemus, Jr.,
40 Wall Street,
New York 5, N. Y.

Dated: October 30, 1946.

Filed United States District Court, Denver, Colorado. October 30, 1946. G. Walter Bowman, Clerk.

[fol. 19] ORDER DENYING MOTION OF DEBTOR FOR STAY OF EXECUTION OF THE PLAN OF REORGANIZATION HEREIN.

This matter having this day come on for hearing in open court on the Motion of Debtor for Stay of Execution of the Plan of Reorganization Herein, and the court having heard the arguments of counsel and being fully advised in the premises, it is

ORDERED that said motion be and the same is hereby denied.

ENTERED ON THE DOCKET this 30th day of October, A. D. 1946—G. Walter Bowman, Clerk of the United States District Court, District of Colorado.

[fol. 20] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO,

No. 8669

In the Matter of THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, Debtor.

THE DENVER AND SALT LAKE WESTERN RAILROAD COMPANY, Subsidiary Debtor.

In Proceedings for the Reorganization of a Railroad.

NOTICE OF APPEAL.

NOTICE IS HEREBY GIVEN that The Denver and Rio Grande Western Railroad Company, debtor above named, and The Denver and Salt Lake Western Railroad Company, subsidiary debtor above named, jointly, and each of them severally, hereby appeal to the United States Circuit Court of Appeals for the Tenth Circuit from the order entered in this Court on October 30, 1946, upon the petition of the debtor for an order:

(a) Vacating and setting aside its orders of October 25, 1943 and November 29, 1944, approving and confirming the plan of reorganization certified to it by the Interstate Commerce Commission and

(b) Referring this proceeding back to the Interstate Commerce Commission for the formulation of a new plan under subsection (d) of Section 77 of the National Bankruptcy Act,

in the above entitled proceedings.

Appellants specify the following named parties as appellees: John Evans, J. F. Fitzpatrick, Harvey J. Gunderson, Richard K. Paynter, Jr., and Eugene A. Schmidt, Jr., Reorganization Committee under the Plan of Reorganization of The Denver and Rio Grande Western Railroad Company, [fol. 21] Wilson McCarthy and Henry Swan, as Trustees of the property of The Denver and Rio Grande Western Railroad Company, H. Allyn Hicks, Jr., as Trustee of the

property of The Denver and Salt Lake Western Railroad Company, United States Trust Company of New York, Chase National Bank of the City of New York, Guaranty Trust Company of New York, City Bank-Farmers Trust Company, Central Hanover Bank and Trust Company, Insurance Group Committee, Reconstruction Finance Corporation, Moffat Tunnel Improvement District and Commission, the State of Colorado, and the Public Utilities Commission of the State of Colorado.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, Debtor,

THE DENVER AND SALT LAKE WESTERN RAILROAD COMPANY, Subsidiary, Debtor,

By W. V. Hodges

H. C. Vidal

F. C. Nicodemus, Jr.

Their Attorneys.

947 Equitable Building
Denver 2, Colorado

Filed United States District Court, Denver, Colorado. October 30, 1946, G. Walter Bowman, Clerk.

[fol. 22] CIVIL BOND ON APPEAL

KNOW ALL MEN BY THESE PRESENTS, That we, THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, and THE DENVER AND SALT LAKE WESTERN RAILROAD COMPANY, as principals, and THE FIDELITY AND DEPOSIT COMPANY OF MARYLAND, as surety, are held and firmly bound unto John Evans, J. F. Fitzpatrick, Harvey J. Gunderson, Richard K. Paynter, Jr., and Eugene A. Schmidt, Jr., as the Reorganization Committee under the Plan of Reorganization for the Denver and Rio Grande Western Railroad Company, debtor, Wilson McCarthy and Henry Swan, as Trustees of the property of The Denver and Rio Grande Western Railroad Company, H. Allyn Hicks, Jr., as Trustee of the property of The Denver and Salt Lake Western Rail-

road Company, United States Trust Company of New York, Chase National Bank of the City of New York, Guaranty Trust Company of New York, City Bank-Farmers Trust Company, Central Hanover Bank and Trust Company, Insurance Group Committee, Reconstruction Finance Corporation, Moffat Tunnel Improvement District and Commission, the State of Colorado, and the Public Utilities Commission of the State of Colorado, in the full and just sum of Two Hundred Fifty Dollars, to be paid to the said John Evans, J. F. Fitzpatrick, Harvey J. Gunderson, Richard K. Paynter, Jr., and Eugene A. Schmidt, Jr., as the Reorganization Committee under the Plan of Reorganization for The Denver and Rio Grande Western Railroad Company, debtor, Wilson McCarthy and Henry Swan, as Trustees of the property of The Denver and Rio Grande Western Railroad Company, H. Allyn Hicks, Jr., as Trustee of the property of The Denver and Salt Lake Western Railroad Company, United States Trust Company of New York, Chase National Bank of the City of New York, Guaranty Trust Company of New York, City Bank-Farmers Trust Company, Central Hanover Bank and Trust [fol. 23] Company, Insurance Group Committee, Reconstruction Finance Corporation, Moffat Tunnel Improvement District and Commission, the State of Colorado, and the Public Utilities Commission of the State of Colorado, their heirs, executors, administrators, successors or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors or assigns, jointly and severally by these presents.

Sealed with our hands and dated this 30 day of October, in the year of our Lord, one thousand nine hundred forty-six.

Whereas, lately, at the May Term, A. D. 1946, of the District Court of the United States, for the District of Colorado, in a proceeding pending in said Court for the reorganization of The Denver and Rio Grande Western Railroad Company, debtor, and The Denver and Salt Lake Western Railroad Company, subsidiary debtor, pursuant to Section 77 of the National Bankruptcy Act, an order

was entered on the 30th day of October, 1946, on the petition of the reorganization Committee, for an order:

(a) Vacating and setting aside its orders of October 25, 1943 and November 29, 1944, approving and confirming the plan of reorganization certified to it by the Interstate Commerce Commission and

(b) referring this proceeding back to the Interstate Commerce Commission for the formulation of a new plan under subsection (a) of section 77 of the National Bankruptcy Act.,

[fol. 24] in case No. 8669, in that Court, and the said The Denver and Rio Grande Western Railroad Company, debtor, and The Denver and Salt Lake Western Railroad Company, subsidiary debtor, have taken an appeal to the United States Circuit Court of Appeals for the Tenth Circuit, to reverse said Order in the said Reorganization Proceedings:

NOW, the condition of the above obligation is such that if the said The Denver and Rio Grande Western Railroad Company, debtor, and The Denver and Salt Lake Western Railroad Company, subsidiary debtor, shall prosecute said appeal to effect, and answer all costs if they fail to make good their plea, then the above obligation to be void, else to remain in full force and virtue.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY,

By Wm. V. Hodges (SEAL)
Attorney-in-Fact

Sealed and delivered
in presence of:

.....

.....

THE DENVER AND SALT LAKE WESTERN RAILROAD COMPANY,

By W. V. Hodges (SEAL)
Attorney-in-Fact

THE FIDELITY AND DEPOSIT COMPANY
OF MARYLAND,

By Sidney Moritz (SEAL)
Attorney-in-Fact

Approved:

.....
United States District Judge

Filed United States District Court, Denver, Colorado, Oct. 30, 1946.

G. Walter Bowman,
Clerk.

[fol. 25]

CLERK'S CERTIFICATE ON SHORT RECORD UNDER RULE 75(j) OF THE RULES OF CIVIL PROCEDURE.

UNITED STATES OF AMERICA
District of Colorado

I, G. WALTER BOWMAN, Clerk of the District Court of the United States for the District of Colorado, do hereby certify the foregoing pages numbered from one (1) to twenty-two (22), both inclusive, to be a full, true and correct transcript and copy of the record and proceedings as designated by counsel under Rule 75(j) of the Rules of Civil Procedure, in a certain case lately in said court pending, entitled In the Matter of THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, Debtor, and THE DENVER AND SALT LAKE WESTERN RAILROAD COMPANY, Subsidiary Debtor, Bankruptcy No. 8669, as fully and completely as the same still remain on file and of record in my office at Denver, Colorado.

IN TESTIMONY to the above, I do hereunto sign my name and affix the seal of said Court at the City and County of Denver in said District, this 30th day of October, A. D. 1946.

G. Walter Bowman
Clerk

(SEAL)

Filed, Oct. 30, 1946. Robert B. Cartwright, Clerk.

[fols. 25-26] IN THE UNITED STATES CIRCUIT COURT OF APPEALS

TENTH CIRCUIT

No. 3425

In the Matter of THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, Debtor.

In Proceedings for the Reorganization of a Railroad.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, Debtor, Appellants,

vs.

WILSON McCARTHY AND HENRY SWAN, as Trustees of the property of The Denver and Rio Grande Western Railroad Company, H. ALLYN HICKS, JR., as Trustee of the property of The Denver and Salt Lake Western Railroad Company, INSURANCE GROUP COMMITTEE, CENTRAL HANOVER BANK AND TRUST COMPANY, GUARANTY TRUST COMPANY OF NEW YORK, UNITED STATES TRUST COMPANY OF NEW YORK, THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, CITY-BANK FARMERS TRUST COMPANY, RECONSTRUCTION FINANCE CORPORATION, MOFFAT TUNNEL IMPROVEMENT DISTRICT AND COMMISSION, THE STATE OF COLORADO, PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO, AND JOHN EVANS, J. F. FITZPATRICK, HARVEY J. GUNDERSON, RICHARD K. PAYNTER, JR., AND EUGENE A. SCHMIDT, JR., as REORGANIZATION COMMITTEE under Plan of Reorganization for The Denver and Rio Grande Western Railroad Company, Debtor, Appellees.

Appeal from Order Dismissing Petition to Return Plan to The Interstate Commerce Commission.

Filed Oct. 30, 1946. Robert B. Cartwright, Clerk.

Comes now the appellant and respectfully shows:

Heretofore and on the 17th day of September, 1946, the appellant, The Denver and Rio Grande Western Railroad

Company, Debtor, filed its petition in the District Court of the United States for the District of Colorado praying the Court to order the Plan of Reorganization for the appellant, heretofore confirmed by said District Court on November 29, 1944, to be returned to the Interstate Commerce Commission for consideration.

[fol. 27] That thereafter and on or about the 25th day of October, A. D. 1946, all of the appellees save and except Wilson McCarthy and Henry Swan, Trustees, H. Allyn Hicks, Jr., Trustee, the Reorganization Committee, City Bank-Farmers Trust Company, Reconstruction Finance Corporation, Moffat Tunnel Improvement District and Commission, the State of Colorado and the Public Utilities Commission of the State of Colorado, joined in a motion that the petition of said appellant be summarily denied. That on the 30th day of October, A. D. 1946, said motion was heard and said petition was dismissed.

That the appellant, your petitioner, has appealed from said Order and has docketed said appeal in this Court. That the purpose of Debtor's said petition was to secure from the District Court an Order returning said Plan of Reorganization to the Interstate Commerce Commission in order that the Commission might reconsider and take cognizance of changed economic conditions now existing in the nation and in the territory served by the Debtor's railroad property and which have developed since the closing of the record of testimony before the Interstate Commerce Commission on the 20th day of May, A. D. 1941, and which were not ascertainable at that time, and might consider significant legislative and executive action interpretative of Section 77 taken on or about the 3rd and 13th days of August, 1946.

That the primary facts now possible to lay before the Commission are the revelation of postwar economic conditions in the nation, postwar demand for the services of Debtor's property, which demand is in excess of any demand enjoyed pre-Depression, exclusive of any extraordinary demand for the transportation of materials necessitated by the war effort, a material lowering of interest rates for long time hire of money, and of the fair and

reasonable rate for capitalization of normally expected earnings with the consequent increase of fairly determined capitalization in an amount sufficient to satisfy the demands in reorganization of all the Debtor's creditors and leave [fol. 28] a substantial equity for the Debtor.

That an established and definitely provable increase in the demands for the services of Debtor's railroad by newly created industries justifies a further increase of capitalization. That at the time the factual record was being considered by the Interstate Commerce Commission it was not demonstrable that an increase in freight and passenger tariff rates would result in a substantial increase of income for the Debtor because of the threatened loss of business to competitive transportation agencies that might result from such increases. That now the necessity and demand for Debtor's transportation service is so great and the comparative regulation of competing agencies is such that a fair and reasonable increase in the tariff rates for the service of Debtor's property will not result in a substantial curtailment of the demand for such services, and will result in a gross income which will yield a net income more than adequate for the service of Debtor's obligations to its creditors.

That by the legislative and executive action set forth in Debtor's said petition the highest legislative and executive authority has, since the closing of said record before the Interstate Commerce Commission, declared an interpretation for Section 77 which the Interstate Commerce Commission, as the creature of such legislative and executive authority, is obliged to heed and to adopt and to follow the meaning of Section 77 as originally intended by Congress, to the end that no Plan forfeiting the rights of junior creditors and debtors shall be proposed and executed under Section 77.

That said new conditions make relevant and material other matters and things not of sufficient importance hitherto and before the justification for added capitalization became evident to require investigation and determination, but which now require judicial consideration by the bankruptcy court, to wit, the effect of the appropriation

and use of substantially $40,000,000 of distributable income [fol.29] as accounted by the rules of the Interstate Commerce Commission for accounting of railroad operations, plus a further cash realization of approximately $40,000,000 from the consumption and conversion of capital and the withholding of the greater part thereof from the creditors, and the expenditure thereof for the use, benefit and advantage of the creditors, and the improvement of the security for Debtor's indebtedness.

That since the closing of said record before the Interstate Commerce Commission the value and earning power of the stock of the Utah Fuel Company has been actually demonstrated, and that value, which exceeds $5,000,000, is now applicable as a credit on the claims of the holders of the Western Consolidated bonds and in law and equity should be so credited before the distribution of any securities to said bondholders.

That the Debtor's right to have the Interstate Commerce Commission consider the newly developed factors and changed conditions presents an undetermined justiciable question. Such duly demonstrable facts and economic conditions require consideration by the Interstate Commerce Commission for action, which action is thereafter subject to scrutiny by the District Court and subject to judicial review by Federal Courts with appellate authority. And the District Court erred in denying appellant's said petition, thereby depriving appellant of the right to have such newly demonstrable facts and conditions considered.

That it is the purpose and intent of the Reorganization Committee appointed by the court below, and of the court, to execute the Plan of Reorganization with the greatest speed and distribute new securities under the Plan, and without noting thereon or informing those who accept the same that said securities are subject to modification by future action of the bankruptcy court.

That if, on consideration, this Court should reverse the action of the District Court, the appeal to this Court would be ineffective should the distribution of securities before and without consideration by the Interstate Commerce

[fol. 30] Commission of the changed factors above alleged and such appropriate judicial action occur, and the damage to your petitioner will be irreparable. That immediately upon issuance and delivery of the securities contemplated by said Plan they may thereafter speedily pass from hand to hand and upon valid consideration, and so be purchased by persons who would claim to be innocent purchasers thereof, and the recall thereof would involve multifarious claims and litigation and be in large measure impossible.

That your petitioner has applied to the District Court of the United States for the District of Colorado for a stay of the execution of said Plan and said stay has been refused.

WHEREFORE, your petitioner prays an Order of this Court staying the execution of said Plan and the taking of further steps in carrying out the same until the matters and things herein set forth may be properly considered by this Court and by the Interstate Commerce Commission, by the District Court, and by such further review as may be permitted under the laws and rules of procedure of the judiciary, and for further orders in the premises.

Respectfully,

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, Debtor,

By Wm. V. Hodges,

H. C. Vidal,
947 Equitable Building,
Denver 2, Colorado.

F. C. Nicodemus, Jr.,
40 Wall Street,
New York 5, N. Y.

Dated: October 30, 1946.

[fol. 31] IN THE UNITED STATES CIRCUIT COURT OF APPEALS
TENTH CIRCUIT

No. 3425

In the Matter of THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, Debtor.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, Debtor, ET AL., Appellants,

vs.

WILSON McCARTHY and HENRY SWAN, Trustees, ET AL., Appellees.

In Proceedings for the Reorganization of a Railroad.

ORDER.

Upon consideration of the application of the petitioner, The Denver and Rio Grande Western Railroad Company, Debtor herein, for an order staying further proceedings in the District Court of the United States for the District of Colorado in a proceeding in bankruptcy numbered 8669 therein entitled "In the Matter of The Denver and Rio Grande Western Railroad Company, Debtor," to effect the consummation of the Plan of Reorganization for the Debtor's property heretofore and on the 29th day of November, A. D. 1944 confirmed by said court in said proceedings, and good cause having been shown,

IT IS HEREBY ORDERED:

That all proceedings in the District Court of the United States for the District of Colorado to consummate the Plan of Reorganization of the properties of the Debtor, The Denver and Rio Grande Western Railroad Company, and its subsidiaries, be and they are hereby stayed, and that no further action be taken under or pursuant to the Order of the United States District Court for the District of [fol. 32] Colorado herein dated the 29th day of November,

1944, confirming said Plan, and that no further action be taken or Orders entered in said court providing for the taking of any steps to effect the consummation of said Plan until this Court shall dispose of the appeal herein in No. 3425 in this Court from the Order of the District Court of the United States for the Distirct of Colorado in said proceedings numbered 8669 dated the 30th day of October, A. D. 1946, dismissing and denying the motion of the Debtor to return the Plan to the Interstate Commerce Commission for further consideration and pending the further Order of this Court directing its final disposition of the matters and things at issue in this cause.

Petitioner shall promptly file a bond in the amount of One Thousand Dollars ($1,000.00) conditioned that it will pay all costs and damages properly awarded against it because of this appeal.

November 2, 1946.

Orie L. Phillips
U. S. Circuit Judge.

Filed Nov. 2, 1946. Robert B. Cartwright, Clerk.

[fol. 33] CIVIL BOND ON APPEAL.

STAY BOND.

KNOW ALL MEN BY THESE PRESENTS, That we, THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, as Principal, and THE FIDELITY AND DEPOSIT COMPANY OF MARYLAND, as Surety, are held firmly bound unto John Evans, J. F. Fitzpatrick, Harvey J. Gunderson, Richard K. Paynter, Jr., and Eugene A. Schmidt, Jr., as the Reorganization Committee under the Plan of Reorganization for The Denver and Rio Grande Western Railroad Company, Debtor, Wilson McCarthy and Henry Swan, as Trustees of the property of The Denver and Rio Grande Western Railroad Company, H. Allyn Hicks, Jr., as Trustee of

the property of The Denver and Salt Lake Western Railroad Company, United States Trust Company of New York, Chase National Bank of the City of New York, Guaranty Trust Company of New York, City Bank-Farmers Trust Company, Central Hanover Bank and Trust Company, Insurance Group Committee, Reconstruction Finance Corporation, Moffat Tunnel Improvement District and Commission, the State of Colorado, and the Public Utilities Commission of the State of Colorado, in the full and just sum of One Thousand Dollars ($1,000.00), to be paid to the said John Evans, J. F. Fitzpatrick, Harvey J. Gunderson, Richard K. Paynter, Jr., and Eugene A. Schmidt, Jr., as the Reorganization Committee under the Plan of Reorganization for The Denver and Rio Grande Western Railroad Company, Debtor, Wilson McCarthy and Henry Swan, as Trustees of the property of The Denver and Rio Grande Western Railroad Company, H. Allyn Hicks, Jr., as Trustee of the property of the Denver and Salt Lake Western Railroad Company, United States Trust Company of New York, Chase National Bank of the City of New York, Guaranty Trust Company of New York, City Bank-Farmers Trust Company, Central Hanover Bank and Trust Company, Insurance Group Committee, Reconstruction Finance Corporation, Moffat Tunnel Improvement District and [fol. 34] Commission, the State of Colorado, and the Public Utilities Commission of the State of Colorado, their heirs, executors, administrators, successors and assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally by these presents.

Sealed with our hands and dated this 4th day of November, in the year of our Lord, one thousand nine hundred forty-six.

Whereas, lately, in the May Term, A. D. 1946, of the District Court of the United States for the District of Colorado, in a proceeding pending in said Court for the reorganization of The Denver and Rio Grande Western

Railroad Company, Debtor, and The Denver and Salt Lake Western Railroad Company, Subsidiary Debtor, pursuant to Section 77 of the National Bankruptcy Act, an order was made on the 30th day of October, 1946, on the petition of the said Debtor and the said Subsidiary Debtor for an order:

(a) Vacating and setting aside its orders of October 25, 1943, and November 29, 1944, approving and confirming the Plan of Reorganization certified to it by the Interstate Commerce Commission, and

(b) referring this proceeding back to the Interstate Commerce Commission for the formulation of a new plan under sub-section (a) of Section 77 of the National Bankruptcy Act,

in case No. 8669, in that Court, and the said The Denver and Rio Grande Western Railroad Company, Debtor, and The Denver and Salt Lake Western Railroad Company, Subsidiary Debtor, have taken an appeal to the United States Circuit Court of Appeals of the Tenth Circuit to reverse said order in the said reorganization proceedings, which appeal in the United States Circuit Court of Appeals is case No. 3425; and

[fol. 35] WHEREAS the said Circuit Court of Appeals, by its order entered in the said appeal on November 2, 1946, granted a stay of further proceedings to consummate said Plan of Reorganization, and directed the said The Denver and Rio Grande Western Railroad Company to file a bond in the amount of One Thousand Dollars ($1,000.00), conditioned that it would pay all costs or damages, properly awarded against it because of the said appeal;

Now, the condition of the above obligation is such that if the said The Denver and Rio Grande Western Railroad Company shall prosecute said appeal to effect, and answer all damages and costs if it fails to make good its plea, then

the above obligation to be void, else to remain in full force and virtue.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY,

By /s/ William V. Hodges (SEAL)
Attorney-in-fact.

Sealed and Delivered
in presence of:

.....
.....

THE FIDELITY AND DEPOSIT COMPANY OF MARYLAND,

By /s/ Sidney Moritz (SEAL)
Attorney-in-fact.

Approved:

/s/ Robert B. Cartwright
Clerk of United States Circuit
Court of Appeals

Filed Nov. 4, 1946. Robert B. Cartwright, Clerk.

[fol.36] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO SITTING AT DENVER.

Pleas and proceedings before The Honorable J. Foster Symes, Judge of the United States District Court for the District of Colorado, presiding in the following entitled cause:

IN THE MATTER of The Denver and Rio Grande Western Railroad Company, Debtor.
No. 8669.

[fol. 37] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO

No. 8669

In the Matter of THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, Debtor.

Before: HON. J. FOSTER SYMES, District Judge.

TRANSCRIPT OF PROCEEDINGS ON MOTIONS TO DISMISS PETITION OF DEBTOR TO REOPEN.

Denver, Colorado,
October 30, 1946.

APPEARANCES.

For the Trustees: Henry McAllister, Esquire; John L. J. Hart, Esquire; and Thomas R. Woodrow, Esquire.

For the Debtor Railroad: William V. Hodges, Esquire, and Joseph C. Hodges, Esquire.

For the Insurance Group Committee: Morrison Shafroth, Esquire, and George D. Gibson, Esquire.

For the Reconstruction Corporation: Charles Bromley, Esquire.

[fol. 38] For Reorganization Committee: Montgomery Dorsey, Esquire; Kenneth F. Burgess, Esquire; and Allan R. Phipps, Esquire.

For the Central Hanover Bank and Trust Co.: Miss Norma Comstock.

For the United States Trust Co. of New York: L. H. Larwill, Esquire.

For certain holders of Denver and Salt Lake Western bonds: Ralph L. Carr, Esquire.

For Guaranty Trust Co. of New York: Robert G. Bosworth, Esquire.

[fol. 39] The Court: We have several Rio Grande matters set for this morning, gentlemen. Have you any suggestion as to what order we shall take them up in?

Mr. Shafroth: If the Court please, I suggest that Mr. Gibson's and Mr. Burgess' motions be first heard challenging the sufficiency of the petition which has been filed.

Mr. Hodges: Mr. Burgess' motion is not set. Mr. Burgess' motion is not a motion to dismiss. That is a motion which puts in issue facts which involve a trial of this matter.

The Court: Here is a motion of the Insurance Group and the Senior Indenture Trustees in regard to the petition.

Mr. Hodges: That is the motion that is set for today.

The Court: All right, we will take that up first, then. This is Mr. Gibson's motion?

Mr. Gibson: Yes, Your Honor.

The Court: All right, proceed.

Mr. Gibson: May it please the Court, this has been a long proceeding, as no one knows better than Your Honor. It was almost ten years after the proceedings began that Your Honor, by an order entered on November 29th, 1944, confirmed the plan of reorganization. But the debtor appealed from that order. The appellate proceedings continued through the Supreme Court, and they were terminated by an opinion and order of the Supreme Court on June 10th of this year affirming Your Honor's orders in approving and confirming the plan, and by a further order [fol. 40] of the Supreme Court entered as recently as Monday of this week denying petitions for rehearing. Your Honor this morning has the unusual privilege of sitting on a direct appeal from the final judgment of the Supreme Court. To put it in another way, the debtor, having litigated this case from this Court to the Circuit Court and then to the Supreme Court, is now attempting to start it all over again.

Of course, the reorganization of a railroad is a preeminently practical question, so practical as to raise the

issue in this anomalous motion of Mr. Hodges whether it really was the intention of Section 77 to provide that kind of a merry-go-round for the bar or whether it merely was the intention of the law to reach some final result at some particular time.

The first point I want to present to Your Honor this morning is that it was the intention of Section 77 to do just that—to reach some final result at some particular time—and that time has now arrived by the final adjudication of the order confirming the plan. It is our position that when an order confirming a plan is finally affirmed on appeal, that conclusively terminates the whole controversy and conclusively adjudicates the question of participation under the plan, including every issue that Mr. Hodges seeks to raise again by his petition here—the question of what classes shall and what classes shall not participate under the plan. It follows that it is not now competent for the debtor to reopen these issues, as debtor's motion seeks [fol. 41] to do, and we ask Your Honor so to rule.

But, if, on the other hand, it were competent for the debtor to request a reopening of these issues heretofore determined, then, surely, under familiar practice, that could be done only by a motion for rehearing. The debtor's petition, or so-called petition, that has been filed, is, in fact, just that, both in form and in substance, because it asks Your Honor to modify and vacate the orders heretofore entered approving and confirming the plan and thereupon to remand the proceedings back to the Interstate Commerce Commission. It follows, of course, that the debtor is the moving party here this morning. The Insurance Group Committee and the Senior Indenture Trustees are not the moving parties. We have filed a motion to deny summarily this untimely and anomalous petition of the debtor, but we have done that only as a matter of convenience to clarify the issues for the argument this morning, and because the debtor has required us to do so as a condition to agreeing that the issue might be heard here this morning.

The debtor's motion for rehearing is, of course, to be

considered in the light of the whole record, and that means all of Your Honor's previous opinions and orders approving and confirming the plan and all of the appellate proceedings had thereon. In the second place, it means all papers heretofore filed up to this date in this proceed-
[fol. 42] ing, and it includes, of course, all of those matters of which Your Honor may properly take judicial notice.

Considered in that setting, we submit to Your Honor that this motion of the debtor presents nothing but a stale controversy that has been repeatedly submitted to the Courts before and repeatedly decided against it. But, not only that, the debtor's petition wholly fails on its face to make such a statement of a case as to justify any reconsideration of the issues heretofore determined.

Of course, Your Honor, we wish to give every consideration that is proper to this motion of the debtor, and for our part we should like to have not only a ruling by Your Honor on the legal point I have mentioned, that the final adjudication of a confirmation order concludes the controversy, but also that we might get a ruling from Your Honor on the fac ual point I have just mentioned, that the debtor's petition fails to state such a case as to justify reconsideration of issues heretofore determined. We want that because, among other reasons which the Supreme Court properly gives, to use its own words, the Supreme Court attributes "especial weight" to Your Honor's decision in view of your extensive familiarity with the reorganization. That is the second point we wish to present this morning, the point that the debtor's motion, even if it may be properly considered at all, nevertheless fails to state such a case as to justify any reconsideration of the
[fol. 43] determination heretofore made.

If Your Honor approves those two points, then we shall ask Your Honor that an order be entered which will, without receiving any evidence at all, summarily deny the debtor's motion on the two grounds I have mentioned, and in concluding I shall have a few words to say on the form of suggested order.

But, taking up now the first of those two points, we all recognize that Section 77 has been criticized as affording

excessive or undue opportunities for litigation and delay. But one merit it surely has—that of providing some identifiable time when the controversy closes. The first two sentences of Sub-section (f)—I do not like to read, but I would like to read those two sentences from Sub-section (f) of Section 77, which provide, skipping the irrelevant words:

> "Upon confirmation . . . the provisions of the plan and of the order of confirmation shall, subject to the right of judicial review, be binding upon the debtor, all stockholders thereof . . . and all creditors. Upon confirmation . . . the debtor and any other corporation or corporations organized or to be organized for the purpose of carrying out the plan, shall have full power and authority to, and shall put into effect and carry out the plan and the orders of the Judge relative thereto."

We submit there could be no clearer way to state it, that, subject only to the right of judicial review, a confirmation [fol. 44] order finally determines all questions of participation, including Mr. Hodges' question of what classes shall and what classes shall not participate under the plan, and these words "subject to the right of judicial review" gives special emphasis to that result. Of course, they mean that an order of confirmation may be revised or, indeed, upset on appeal. But they also affirmatively show a Congressional purpose that a confirmation order shall not be reviewed by any other form of proceeding except a direct appeal, and especially not by a proceeding of the kind Mr. Hodges begins here this morning. The language means that when a confirmation order is finally adjudicated and approved on appeal, that closes the controversy.

And there is another indication of the legislative intention to this same effect. As Your Honor knows, Chapter X, providing for industrial reorganizations, contains an express provision that a plan may be modified "before or after its confirmation." A similar provision is contained in the preceding section, Section 77-B. Of course, there is no such provision in Section 77, manifestly. The in-

clusion of such a provision in the industrial statute and its omission from the railroad statute is a strong indication of the Congressional purpose that a finally adjudicated confirmation order closes the controversy in the case of a railroad reorganization.

It is of interest in that connection to note that the policy for finality—a common-sense practical design for reaching [fol. 45] an end somewhere—is so strong that, in the face of these words I quoted from Chapter X, the Circuit Court of Appeals of the Seventh Circuit, in disposing of a case under Section 77-B, which had the same words and was the predecessor of Chapter X, In Re Diversey Building Co., in 1944, said:

> "We cannot accept appellant's interpretation of this Act. We are convinced that Congress did not intend that a debtor corporation should be permitted to ask for a radical change of plan of reorganization after it had been confirmed by the Court and was being executed under the Court's supervision . . . We interpret Sub-Section (f) to mean that changes and modifications after the plan is confirmed refer to such changes as will better aid in carrying out the plan which has been finally confirmed, and not such changes or modifications as will materially alter the property rights established by the decree of confirmation."

We submit to Your Honor that a decree of confirmation is final under Section 77 when no such provision for modification is given.

And no argument can be made against that result by Mr. Hodges on the basis of the third sentence of Subsection (f) of Section 77. I quoted the first two sentences of that sub-section, and the next one goes on to say:

> "The property dealt with by the plan, when trans- [fol. 46] ferred and conveyed to the debtor or to the other corporation or corporations provided for by the plan, or when retained by the debtor pursuant to the plan, shall be free and clear of all claims of the debtor, its stockholders and creditors, and the debtor shall be discharged."

These words, however, speak in terms of a later moment than the confirmation order—that is, the turning over of the properties was, we believe, merely declaratory of the legal situation brought into being by the final confirmation order.

But the most that a debtor could say on that—and we cannot admit that any such statement is a true statement—but the most the debtor could urge is that because the detailed provisions of the mortgages and other corporate papers are not at hand when the confirmation order is entered that the old legal rights will not be modified at law pursuant to the plan until the property is turned over to the reorganized company. But it is still true that the rights of participation, with which alone Mr. Hodges is concerned, are, subject only to any intervening administrative expenses, conclusively fixed in equity. Indeed, there is nothing left to determine with respect to classes, like the stockholders represented by Mr. Hodges, who receive nothing under the plan. It was of no concern to them whether the new mortgages show this or show that, and in neither case do they participate. The situation, in short, is the familiar one where an adjudication in equity conclu- [fol. 47] sively determines all rights of the parties, though the formal modification of their legal rights may be postponed until the time of the execution of the decree. For example, an agreement to sell land may be specifically enforced in equity, and a decree of specific enforcement conclusively settles the whole controversy. It may be true that the former legal title may continue in the promissor under that agreement until the actual execution of the decree.

So we submit that the statutory framework of Section 77 is clear and simple. Has Your Honor taken the final action of the sort that Section 77 authorizes? There can be no doubt about that. In Your Honor's confirmation order, the Court spoke in terms of unmistakable finality, and if I may quote from a few of them, that will be apparent. Paragraph B says in part:

> "The provisions of the plan and of this order shall forthwith become and be, and are hereby declared to be, final and binding upon the debtor and the sub-

sidiary debtor, and all of their respective stockholders, including those who have not, as well as those who have, accepted the plan, and all creditors." That is on page 11482 of the printed court proceedings.

Paragraph D in the same confirmation order says:

> "The rights of all stockholders and creditors of the debtor and the subsidiary debtor and of all other [fol. 48] parties in interest shall be only those provided by the plan."

The next paragraph, Paragraph E, says:

> "The debtor, the subsidiary debtor, and any new corporation organized to receive the properties of the debtor or the subsidiary debtor upon the consummation of the plan be, and each of them hereby is, authorized and directed, and shall have full power and authority, to take all steps, and do all things, necessary on its or their part to put into effect and carry out the plan and the orders of this Court relative thereto."

And finally, in Paragraph I, at page 11484 of the printed court record:

> "This order shall become, and it is hereby declared to be, effective immediately upon its entry in this proceeding by the signature of the Judge of this Court."

So, in summary, we submit that Section 77 clearly contemplates that a confirmation order shall be in final form, and, when put in that final form, it finally concludes the controversy. Your Honor's order confirming the plan was unmistakably in such final form, and its final affirmance by the Supreme Court lays at rest all issues that have been raised here, and it is not now competent for the debtor to reopen those issues by any form of new proceeding. We ask Your Honor that the debtor's motion be denied on that ground, as to the first of our two points.

[fol. 49] In addition, we ask Your Honor to hold, as I have said in my introductory statement, that the debtor's petition wholly fails to state such a case as would justify reconsideration of the determinations heretofore made in the

orders that approve and confirm the plan. Of course, for that purpose we look at the words of the motion, to see what they say.

Section 1 of the debtor's motion talks about the interests it represents, and they are, if anybody at all, clearly the holders of the old stock. There is a reference to unsecured creditors, but that is not now important, whether the debtor represents those creditors or not, because they have been held likewise to have no interest in the plan and do not participate in it. The debtor also passes on the third class, and also claims to speak for the holders of the general mortgage bonds, and I quote:

> "If by reason of the limitations of Section 77 . . . they may not be lawfully and fully represented in this proceeding by City Bank Farmers Trust Company as mortgage trustee."

There cannot be any question but what a mortgage trustee may lawfully and fully represent the interest of its bondholders. That is what its job is to do. It can do it much better than the debtor can, who is an obligator on the bonds and thus has a conflicting interest. So, in short, the debtor speaks only for the old stock, if for anyone, [fol. 50] and it is of interest that the City Bank Farmers Trust Company, whose conduct and diligence have been beyond praise in the prosecution of every permissible step for the protection of its bondholders, has filed no such paper as this unfounded and anomalous motion by Mr. Hodges.

Section 2 of the debtor's motion indicates that the main premise of the whole argument to Your Honor is a change of economic conditions affecting reorganization values,—that is, a change for the better—a bigger and better future. But, at this point, that statement in the pleading is only by way of a general flourish, and I will deal with it specifically when I come to that specific point later asserted in the motion.

You may note in Section 3 a misstatement of the record. The claim is made that the record was formally closed on May 20th, 1941. If there is some mysterious virtue that

the word "formally" possesses, that is not a misstatement, but otherwise it is. However, the statement is made that the record was formally closed on May 20th, 1941, but Your Honor well knows and the Supreme Court knew that the record contained the transcript of hearings held in October, 1942, and in April, 1943, and, further, as the opinion of the Supreme Court recites, the current earnings statements were also before the Commission. But, apart from that misstatement of the record, Section 3 repeats only this general flourish about the wonderful future that lies ahead of us, and it blends with that an insinuation that all prior applications of Section 77 have now been in- [fol. 51] validated just by the discussions that accompanied the unsuccessful effort to amend Section 77 by the last session of the Congress. That is not a new idea of the debtor. Far from it! That insinuation was developed at great length as the main basis for the debtor's petition for rehearing in the Supreme Court, and that petition for rehearing was denied just this week. We may take it that the Supreme Court is a qualified spokesman on this matter, and that nothing now remains for Your Honor to consider or determine. The Supreme Court's mandate to Your Honor directs that further proceedings be forthwith had in this cause in accordance with and, in effect, to carry out its opinion affirming the approval and confirmation of the plan.

And it is significant also to mention this. The debtor has readily recognized the meaning and effect of such a mandate. It has repeatedly sought to postpone the date when the mandate should come down. First of all, they went to Mr. Justice Reed, without notice to us and asked—and I might say that the rules permit that to be done—and asked that the mandate be stayed for a particular time. Mr. Justice Reed granted such a stay. Once again the debtor similarly went to Mr. Justice Reed with a similar request, and a similar result, but when they went before Mr. Justice Reed at that time he said, as I am told, although I was not there, "If you gentlemen have a third plea of this kind, I should like to see notice given to the other side." The time went on, and at a time when I [fol. 52]was in the woods of New Hampshire trying to avoid work, the debtor asked a further stay, and notice

came to me, and I went to resist this stay in oral argument before Mr. Justice Reed. I knew nothing of the state of affairs of Your Honor's agency, the reorganization committee, and the progress that they had made. I did not think it proper that the Court should be asked to act on general hypotheses and arguments, and I informed counsel that I should telegraph to Mr. Burgess, who knew all the facts, and ask him if he would not supply a letter setting out the concrete situation then existing before the reorganization committee and what its plans were, in order that, if Mr. Justice Reed should consider this third application for a stay, he should have all of the facts before him. Mr. Burgess wrote such a letter; in which he pointed out the various steps that had to be taken and that were being taken by the reorganization committee, and in terms made it clear that it was their resolve, if possible, to consummate the reorganization plan, both as to the Rio Grande and as to the Salt Lake, before the end of December. I read that letter, word for word, to Mr. Justice Reed, and he asked or directed that it be made a part of the record. So it was on that record that the third application for a stay was denied, and it was on that record that the mandate I have referred to was dispatched to Your Honor, and finally it was on that record on the day before yesterday that the Supreme Court denied all petitions for rehearing.

[fol. 53] But let me come back to the next section of this motion of the debtor. That is Section 4. That is the real heart of the debtor's motion. The orders approving and confirming the plan, the motion asserts, should be vacated because of three changes in relevant conditions, and they are very interesting changes, as I shall point out. The first is a decline in interest rates—a decline in interest rates! Next is the Geneva steel plant, and finally there is what the motion calls "a permanent elevation of the national income." That may seem a strange phrase in today's conditions, but they are quoting "a permanent elevation of the national income." We may take these briefly in that order.

First, on the interest rates, that argument about interest rates was one of the main bases on which the debtor

asked the Supreme Court to reverse Your Honor's action in confirming the plan. The debtor urged that the going rate of money for railroads had declined from four per cent provided in this plan—and let me divert there just for a moment—this four per cent that is bandied about so casually refers to a first mortgage bond on which the coupon is three per cent fixed and one per cent contingent. But, apart from that, the debtor's argument was that the going rate for money for railroads had declined from four per cent to a level of three per cent, and that, even if reorganization values were to be determined by earnings—and that concept [fol. 54] was not popular with the debtor—a complete reorganization was required by that circumstance. In support of that assertion, the debtor asked the Supreme Court to take judicial notice of all recent railway financing and reorganization, and a total of twenty issues of all sorts were set out in its brief. But the Supreme Court made short work of that contention, and in rejecting it the Court said:

> "We note also the contention that the possibility of a national income much higher and interest rate much lower than before World War II should affect valuation based on prospective earnings. Those factors, we think, were before the Commission when it made its earnings estimate."

And then, again, dealing not in terms of what was before the expert administrative agency but what the Court thought itself, the Supreme Court said:

> "Nothing that respondents have called to our attention indicates any improvement in economic conditions or prospects in July, 1944, or any date since, over June, 1943, the date of the Commission's approval of the plan, which would justify a treatment different from that accorded the claimants in 1943."

That is a decisive rejection in terms of the Supreme Court's own direct views of the argument based on interest rates, as well as the income argument, which I shall come to later.

Then, unconvinced by this decision of the Supreme Court, [fol. 55] the debtor renewed the same contention in its

petition filed July 2nd, 1946. Indeed, at that time the asserted decline was said to be one and one-half per cent, instead of the one per cent that they had been claiming in February, or, in other words, the whole amount now claimed in the present motion. The denial of that rehearing on the basis of that petition constitutes, we respectfully submit to Your Honor, a decisive and final rejection of that argument.

So, look at this situation. They come back into Your Honor's court with the same argument which was twice submitted to and twice rejected by the Supreme Court. The debtor renews that contention here, in spite of a double rejection by the Supreme Court, and in view of a marked upward trend in interest rates since the Supreme Court spoke on June 10th. In other words, the tide has been running in a direction opposite to that asserted by the debtor's motion.

Your Honor may have noticed the market quotations, as the Supreme Court itself did in this particular proceeding, and I should like to comment upon a few, though not many. When the opinion of the Supreme Court was handed down on June 10th of this year, the Dow-Jones average of the ten first-grade rails was 117.25. On October 18th it was 110.25,—a decline of seven points in first-grade rail bonds average in that period. Of course, that deterioration is even more acute in the case of second-grade rails, where the average declined from 100.61 to 89.79. Those figures are from the Commercial and Financial Chronicle, which is, of course, a standard reporting service.

Turning now from these general averages to the particular situation of the Rio Grande itself, Your Honor may note, as the Supreme Court did, the "when issued" market quotations for the new securities. When the Supreme Court handed down its opinion on June 10th, the bid for the new Firsts was 101, and for the new Incomes it was 79. On October 21st, the corresponding figures were 89½ and 51¾, a decline of 11½ points in the new Firsts and a decline of 27¼ points for the new Incomes.

What does that have to do with yield, that the debtor talks about? When the Supreme Court acted, the current

yield was 3.94 per cent. On October 8th, which was not quite the same date as I have used for these other figures, but not significantly different, the current yield was 4.44 per cent. Mr. Hodges would have Your Honor believe that four per cent is an extortionate sum for these new First Mortgage bonds. People who are betting their money in the market, at least, think that 4.4 per cent is the going rate for a security of that nature and quality. On the new Incomes, at the time of the Supreme Court decision on June 10th, the current rate of return, based on the market, was 5.45 per cent, and it is now 9 per cent. Now, of course, [fol. 57] those figures are based upon yield maturity basis rather than current yield, so it would be higher than I have stated.

So, based on this asserted decline in interest rates, the debtor's motion wholly fails to state any case justifying reconsideration.

Now, what is the next point? It is the Geneva steel plant. That is not a new conception, either. It was repeatedly and vigorously pressed on the Supreme Court all through these proceedings. The debtor's main brief, or its opening brief, on February 15th, 1946, said this plant "is certain to be revolutionary in its contribution to the new earning power of debtor's properties." Of course, we all appreciate the importance of the Geneva steel plant. Everyone welcomes it in the territory. But we all equally know that that kind of a statement is exaggerated. But, in any case, on that basis, the debtor urges to the Supreme Court that the plan should be upset just because of Geneva, and it was urged again by counsel in the oral argument with the assertion that the record was barren of evidence on that point. That is a mistake. In fact, counsel for the debtor in a hearing before this Court in October, 1942, at which Mr. Hodges was personally present and representing the debtor—and I might digress for a moment to say that the transcript was duly certified to the Interstate Commerce Commission and referred to it by the Commission—and in [fol. 58] that hearing Mr. Swan got on the stand and testified about the construction and size of the Geneva steel plant, and it was his evident contemplation that the Geneva steel plant would continue operation after the war and

would make a sizeable or substantial contribution, or, indeed, a large contribution, to the earnings of the road. So, there was, in point of fact, adequate basis on which the Commission could appraise the future in this respect, but that is wholly unimportant now. Whether it be true or not, the Supreme Court has said that the argument in respect to the Geneva steel plant is no reason on which Your Honor's approval and confirmation of the plan could be upset.

So here again, we submit, the debtor's petition wholly fails to state a case justifying reconsideration of the determinations heretofore made.

There is only one other argument in debtor's motion, and that is the argument of the greater prosperity for the present and the long-term future. Nor is this a new conception, dealing, as the motion would indicate, with changed conditions in the country. One of the main bases of debtor's arguments before the Supreme Court was this very question, and I am quoting from its original brief of February 15th, which said:

> "There are other new factors which permanently elevate earning power to a level far above that which could possibly have been estimated."

And that the whole national income will be greater for the [fol. 59] future. But the Supreme Court rejected that argument in words which I have already quoted, pointing out first that these factors, as the Court declared, were before the Commission when it acted, and then holding—and this is, I believe, of such importance that I hope Your Honor will permit me to quote it once more—

> "Nothing that respondents have called to our attention indicates any improvement in economic conditions or prospects in July, 1944, or any date since, over June, 1943, the date of the Commission's approval of the plan, which would justify a treatment different from that accorded the claimants in 1943."

Going beyond that, on this point, the Supreme Court took judicial notice of the petition that had been filed by all the railroads before the Interstate Commerce Commission

for an increase in freight rates on April 15th of this year, and the Supreme Court quoted quite liberally from that petition as to the critical situation of the railroads in view of the great increases in wages and the great increases in costs of fuel and other materials and supplies, and the decline, both in physical volume of traffic and volume of revenue from operations. In speaking of that, the Supreme Court observed with respect to the property now in Your Honor's custody: "The Denver apparently did not vary greatly from this overall picture," and then added: "Even before the transportation difficulties of 1946, it was [fol. 60] obvious that the Commission's judgment was being confirmed by events."

There cannot be any serious suggestion that there has been an improvement in the economic situation or outlook since the decision by the Supreme Court on June 10th of this year, or since the earnings period considered in the Court's opinion. In evidence of its conclusion which I have quoted, the Supreme Court took judicial notice of the interim earnings reports of the railroads for the months of January and February of this year, and pointed out that the operating revenues for that period were eighteen per cent below the corresponding period of 1945. The earning figures through August of this year show that the operating revenues through August of this year were thirty-five per cent under the corresponding period of 1945. The operating ratio is a significant commentary on that situation.

The evidence in the record indicates that for the first eight months of this year the operating ratio was approximately eighty-six per cent, and the corresponding figure for the first eight months of 1945—the very comparison the Supreme Court invites—was sixty-one per cent, or slightly less than that. For the first eight months of 1944, immediately preceding the hearing before Your Honor on the confirmation of the plan, the operating ratio was slightly less than sixty-nine per cent. Today, in other words, or for the first eight months of this year, the operating ratio is eight points above, eight percentage [fol. 61] points above, what it was in the corresponding period just before Your Honor confirmed the plan.

Now, what about the other side of the picture? What about costs? I do not suppose Mr. Hodges can seriously suggest to Your Honor that there has been a decline in operating costs since the Supreme Court spoke on June 10th. Quite to the contrary! Everybody knows, and Your Honor may take judicial notice, that there has been a current and severe increase in pertinent cost levels. But one thing Your Honor will recall, and may properly take judicial notice of, effective as of January 1st of this year, wages were increased by 17.85 per cent above the 1945 level. While the effective date of that change was before June 10th, when the Supreme Court spoke, its impact is accentuated by the subsequent enactment of the Crosser bill on July 31st, 1946, increasing the payroll tax deductions from three and one-half per cent to five and three-quarters per cent, effective as of January 1st of this year, and raising the increase to six per cent on January 1st, 1949, and further raising it to six and one-quarter per cent on January 1st, 1952.

Your Honor, I submit, may also take judicial notice of the United States Department of Labor cost-of-living index as an official publication of the Government—it is the Consumers' Price Index I am referring to—and this indicates an increase of only 2.4 per cent in 1944, substantially at the time of the confirmation, to January 1st of this year, when they increased 11.9 per cent during the period from [fol. 62] January 1st of this year to September of this year, and the index, 889 series, indicates increases during the same periods of three per cent and 22.6 per cent.

It is perfectly clear, we submit, there is nothing in the suggestions on that point by the debtor, which is the last point in its petition, and the debtor's motion wholly fails to state any such case as would justify a reconsideration of the determinations heretofore made. We, of course, respectfully submit that the whole motion should be denied summarily. No motion of that kind, so patently wanting in merit, could serve any purpose except mere delay by opening up the issues and permitting the introduction of testimony. It is in the public interest that this reorganization be speedily consummated, and the creditors are entitled to have that done. From every practical point of

view, therefore, we submit that the petition should be denied now without the receipt of any testimony on the two grounds that I have mentioned.

Now, if Your Honor will permit, I should like to submit a proposed form of order that will accomplish just that.

Mr. Burgess: Your Honor, the reorganization committee desires to support the position that Mr. Gibson has taken and has presented so ably, and it might perhaps be orderly for me at this time very briefly to speak on behalf of the reorganization committee, unless Your Honor would prefer [fol. 63] that I follow Mr. Hodges.

The Court: No, I don't think so. I will hear you now. Do you prefer to go ahead now, Mr. Hodges, or later?

Mr. Hodges: Mr. Burgess, on behalf of the reorganization committee, has filed a motion here which tenders issues of fact, which requires a trial, but that is not set for this morning. I shall be very happy to listen to Mr. Burgess in support of the motion of Mr. Gibson to dismiss this proceeding, which is here for hearing this morning.

Mr. Gibson: It is a motion to deny, not to dismiss.

Mr. Burgess: I think Mr. Hodges misapprehends the nature and substance of the motion that was filed in behalf of the reorganization committee, and I will speak of that at the conclusion of my remarks. However, I will address myself to our support of Mr. Gibson's position at this time.

Mr. Hodges: That will be entirely satisfactory.

The Court: When was your motion filed?

Mr. Gibson: It was on October 25th, Your Honor, and the motion, Mr. Dorsey advises me, on behalf of the reorganization committee was filed on October 28th.

Mr. Burgess: Mr. Phipps says it was filed on the 29th.

The Court: I don't seem to have it here.

Mr. Burgess: I will hand Your Honor a copy of it, that you may wish to examine later, but I will address myself presently to this other matter and refer to that in conclusion.

[fol. 64] You will note that the motion recites simply that, since the Supreme Court has already heard the petitioner on these same points and decided against the petitioner, and since the points are patently without merit, we submit that this Court should deny the debtor's petition for rehearing as wholly wanting in merit and in substance, which is clearly an issue of law and not of fact, as Mr. Hodges seems to infer. However, I want at this time to support Mr. Gibson's position, if I may.

Mr. Montgomery Dorsey and I appear as counsel for the reorganization committee. The reorganization committee has not thus far participated in any of the proceedings before this Court except the matter of submitting the Salt Lake consolidation to a vote.

The plan, Your Honor recalls, provides that a reorganization committee shall be created which shall carry out the plan under the supervision of the Court. The duty, therefore, of the reorganization committee is a single duty, which is simple—to carry out the plan, this particular plan, under the supervision of the Court, and this Court, in its turn, is acting under a very definite mandate, the mandate of the Supreme Court of the United States, a mandate which was issued under date of August 27th of this year, which recites in part and directs in part as follows:

> "It is now here ordered and adjudged by this Court that the judgment of the said United States Circuit [fol. 65] Court of Appeals in these causes be and the same is reversed with costs; the orders of the District Court for the District of Colorado of October 25, 1943, approving the reorganization plan herein, and of November 29, 1944, confirming the plan, are affirmed.
>
> "It is further ordered that these causes be and the same are hereby remanded to the District Court of the United States, for the District of Colorado, for further proceedings."

These further proceedings that are to be had in accordance with the laws of the United States obviously refer to the provisions of the Bankruptcy Act under which this plan was approved and confirmed.

It is provided that, among other things, upon confirmation of the plan, subject only to the right of judicial review, which has already been had, that the plan shall be binding upon the debtor, the stockholders, the creditors, and, further, that upon confirmation of the plan the debtor shall have full authority and power to carry out, and shall put into effect to carry out the plan and the orders of the judge relative thereto.

Therefore, we have here this morning three entities, each of which is charged by law with the single duty of putting into effect this plan. These entities are the Court and the reorganization committee and the debtor. However, one of these entities, the debtor, is presently attempt- [fol. 66] ing not to put the plan into effect, but, instead, to prevent it being put into effect, and, obviously, the reasons which the debtor is advancing for so extraordinary a course, in direct conflict with the mandate of the law, must be scrutinized with a most critical eye. The reorganization committee, on its part, charged as it is with the single duty of putting this plan into effect, also conceives it to be its correlative duty to resist the efforts of any others who seek to prevent the plan from being put into effect. That, of course, does not mean that the reorganization committee, if it were confronted with some great fundamental change in underlying facts, should proceed in utter disregard of it. On the contrary, in those circumstances, the reorganization committee should inform itself and advise the Court in respect to any such changes. But here, however, the reorganization committee, after very careful investigation and consideration of the debtor's petition for rehearing, has concluded that the debtor's petition for rehearing is simply a reiteration of the matters and things that have been hashed and rehashed for the past several years. Second, we feel that the petition is wholly wanting in merit on its face.

Third, we feel that it is in conflict in its assertions with plain facts as they are judicially known to this Court.

Fourth, we say that it can be presented only for purposes of delay.

Fifth, that it is in conflict with the statutory duties [fol. 67] that rest upon the debtor to put this plan into effect and to cooperate in so doing.

In conclusion, as stating the position of the reorganization committee, permit me to refer to a somewhat companion case that has also been very recently passed upon by the Supreme Court of the United States. I refer to the reorganization proceedings affecting the Chicago, Milwaukee, St. Paul and Pacific Railroad Company. Last winter some of the parties in that proceeding representing certain junior interests undertook to get the District Court sitting in Chicago to retain jurisdiction in that proceeding on the representation that Congress was about to pass some laws which might change the rights of the parties. A motion to dismiss that petition was filed and the District Court dismissed the petition. An appeal was taken to the Circuit Court of Appeals, and a motion was filed in that court for an order dismissing the petition. It was heard before Judges Evans, Sparks and Lindley, and on May 17th, 1946, the petition was dismissed. In that decision the Circuit Court of Appeals has made one very significant observation. The Court said:

"In the light of these facts—"

and the facts that are referred to are facts showing a decline in earnings of railroads generally and of the Milwaukee Railroad in particular—the Court said:

> "In the light of these facts, and the further signifi- [fol. 68] cant fact that the peak of the railroad's recent spurt in financial prosperity is now behind it, and serious financial and other problems vex and perplex it, we feel one would have to be an 'incorrigible optimist' to believe that the District Court should have retained jurisdiction of this already accomplished reorganization in the hope (1) that Congress would pass certain legislation, although it has failed to approve prior similar proposals, and (2) if it did, that the condition of the railroad would so improve as to give to appellants revitalized stock."

The moving parties in that proceeding then appealed, and a writ of certiorari on the petition was denied by the Supreme Court of the United States on October 14th of this year.

In other words, not only do we have a denial of the petitions for rehearing in this Denver and Rio Grande case on the day before yesterday, but we have the denial of a petition in a companion case in which similar, and perhaps even broader, allegations were made than are here made.

So, we say to Your Honor that on the face of this petition of the debtor, and in the light of the facts, of which Your Honor may take judicial notice, and especially in the light of the duties that rest upon all of us under the statute, this petition should be forthwith dismissed.

(Thereupon, a short recess was taken.)

[fol. 69] Mr. McAllister: May it please Your Honor, I have considered the position of the trustees in this case as neutral. I shall not make any comment on the argument that has preceded this, but I think that certain facts as shown by the record in this case ought to be before the Court. These are the comparative statements of net revenue from railway operation in the eight months ending with August, 1945, and the eight months ending with August, 1946, as shown by the reports filed in this case.

For the first eight months of 1945 the net revenue from railway operation was $20,447,000, in round figures, and for the eight months ending with August, 1946, it was $4,564,000. In the eight months ending with August, 1945, the net railway operating income was $8,688,000, and for the eight months ending with August, 1946, it was $1,982,000.

That is all I wish to say.

Mr. Hodges: You say those are filed in the record?

Mr. McAllister: They were filed in the record in this case.

Mr. Hodges: When were they filed?

Mr. McAllister: They were filed on Monday.

Mr. Hodges: And those are now in the record, you say?

Mr. McAllister: They are right in the record. Those figures appear in the monthly reports filed in this case.

The Court: Do you wish to proceed now with your [fol. 70] argument, Mr. Hodges?

Mr. Hodges: Yes, Your Honor.

The Court: Very well.

Mr. Hodges: May it please the Court, you will recall that the debtor filed two petitions in this case. One was a petition asking that the plan be referred back to the Commission, and the reasons for that were stated in the petition. The other was a petition asking for an allowance to cover the expense of procuring witnesses to try the issues presented by that petition.

You will recall that after the preliminary setting we came before Your Honor, counsel representing all parties who cared to come, and Your Honor set for the 17th of this month the petition asking for an allowance for witness fees and expenses, and you set for about the 7th of November, as I remember, the hearing on the petition to remand or return the plan to the Interstate Commerce Commission.

Thereupon, not at our solicitation and not upon any conditions prescribed by us, we were asked by the Insurance Group Committee if we would consent to have this matter heard on this 30th day of October on a motion to deny the petition or dismiss the petition grounded upon objections to its sufficiency. At the same time, it was not formally agreed but merely suggested that we might, in connection with the argument on this petition, should the [fol. 71] Court deny the motion to dismiss the petition, ask for an allowance for witness fees, and it was commented upon between Mr. Shafroth and myself that if this petition should not be dismissed the time for a hearing and the taking of relevent testimony should be subsequently determined and we should have adequate time because of the delay which is brought about by that situation. That is why we are here, on that agreement and that understanding.

A comment has been made about our representation. We thought we represented everybody interested in a just and proper plan whose interest is not specifically cared for by someone appearing at this proceeding. But we may be wrong. I think we are right.

A comment has been made upon the fact that under Section 77(f) it is the duty of the debtor to participate in the carrying out of this plan, and that we are faithless to our duty. That is a very amusing observation. This Section 77 provides that when, in a proper way, a plan is ready for execution the debtor shall execute it, and the debtor will never decline that responsibility, if it is not by-passed, as has been done in this and nearly all other cases, through the influence of senior creditors—the debtor is by-passed and it is not allowed to perform the duties that are imposed upon it by Section 77, and a management committee is organized to carry out the plan. So be it! But when the debtor is by-passed and given no opportunity and no responsibility, it is hardly consistent to charge it with a [fol. 72] failure of duty because it is not here pressing for the carrying out of the plan, and the plan is such that they think it is not a just plan and is not in accordance with the law, notwithstanding full faith, credit and accord to the decision of the Supreme Court on the certioraries that were directed to the two orders, the order of approval and the order of confirmation.

I am not going to make the argument that I have made before you so many times, to no avail. The Supreme Court says that the decision of this Court sustaining the interpretation which the Interstate Commerce Commission has given to Section 77, or allowing the Interstate Commerce Commission to make that interpretation, and following along with the Interstate Commerce Commission's idea of what is fair and equitable and in the public interest under their interpretation of Section 77, the Supreme Court says that is all right. But I take great satisfaction—and it is only personal as yet, because it has yielded no fruit for my clients—but I take great satisfaction in the fact that the able members of the House Judiciary Committee, and the House Interstate Commerce Commission, and the whole body of the Senate, and over two-thirds of the members of Congress, approved, step by step, the basic position which I have taken. That will not influence this Court, but it should influence the Interstate Commerce Commission, which is the creature of that Congress, and when it is sup- [fol. 73] ported by the memorandum of the Chief Execu-

tive of this nation saying that he agrees with these provisions, and it is only because he thought the act excluded somebody that should otherwise be included, and because he thought and believed that there was no other provision providing for the control of the railroads—a provision which exists, and has existed for a long time, in the laws covering the Interstate Commerce Commission. So I can only take that satisfaction.

I am not going today to admit that all that the distinguished gentlemen representing the Insurance Group and all the distinguished gentlemen representing the managing committee have to say factually has any place in this argument. The question here is, what does this petition state? What are we talking about now?

There is one point involved in this reading of the statute, Section 77, which counsel makes. There is every ground in the world for a refutation of his argument and a contrary holding under the circumstances of this case. He says that under Section 77(f), when an order confirming the plan is final and that order is no longer subject to further review, that ends it and nothing can be done about it. I submit to Your Honor that is not so. That very section proceeds to define a final decree in these bankruptcy proceedings. It says:

> "Upon the termination of the proceedings a final decree shall be entered discharging the trustee or trustees and making such provisions as may be equitable [fol. 74] by way of injunction or otherwise and closing the case."

As to the general orders in bankruptcy, Section 49(v), after providing that various orders of confirmation, and so forth, shall be sent down to the Commission, (v) then enumerates the final decree.

The order of approval and the order of confirmation are interlocutory orders and they are subject to the power of this Court as a court of bankruptcy to be modified or altered until the date of the final decree, subject to the inherent power of a court of equity to see to it that on the date of its final decree that which it has done shall be nothing less than equity and justice.

There is a peculiar condition here under this Section 77. Your Honor will remember that in the earlier case, either in the Western Pacific or the Milwaukee, Justice Frankfurter used the words—"The Commission and the Court are brigaded." Well, it is pretty hard to know exactly what that means when you use such indefinite language, but there is a brigading. Now, this Commission interprets its powers under the statute, taking one of several possible interpretations, and it then determines what is fair and equitable, and it then determines what is in the public interest, and submits that plan to Your Honor. That is an administrative act, and all through all of the cases that have been considered there sticks out like a thumb the fact that the Supreme Court is treating it as an administrative [fol. 75] act, and wants that administrative body to take every responsibility that is possible—they don't want to be bothered with the matter—and in that way, and for that reason, you will find language in their decisions, which is now coming to a head, emphasizing the powers of that Commission.

That plan comes to Your Honor, and Your Honor has done what the Supreme Court says you should do. You have taken it, and you have studied it, and you have approved and confirmed it. It does not represent and is not supposed to represent anything more that would be in the process of the foreclosure of a mortgage. But it is out of your hands and it is in the hands of that Commission until the plan is formulated, but after that plan is here the Commission can act no more until the Court sends it back. And that is the result of this brigading. But it makes it necessary for this Court to hear and determine what the constitutional duty of the Commission is, and to permit the Commission to function in the performance of that duty. Otherwise, the brigading has fitchered that process, and a complete determination upon hearing of the things that ought to be heard is not possible.

But in this petition we are presenting to you a matter which must be sent to the Commission for them to act upon. Your Honor cannot tell what sort of a plan would evolve. Your Honor cannot tell whether any changes would be made. But Your Honor can submit it to the Commission

[fol. 76] for them to perform their functions. But I will come to that more in detail.

Now, again, under this Section 77 of the Act, if it was contemplated that after the order of confirmation had been finally settled upon, that it was no more than an interlocutory order, but that it was a final order, why in the world would they put this in, this Section (g)—"If, in the light of all of the existing circumstances, there is undue delay in a reasonably expeditious reorganization of the debtor, the Judge in his own discretion or on motion of any party in interest, or on his own motion after hearing, and after consideration of the recommendation of the Commission, may dismiss the proceedings." What right have you got to dismiss it, if this order of confirmation, however solidified by judicial action, is anything more or less than an interlocutory order?

They talk here about the delay, the years and years of delay. If it could do any good, I would propose to Your Honor right now that you dismiss these proceedings and let these senior creditors abide by their bargain and go forward with their foreclosure. I stand for that as a lawyer and as a citizen. But why these ten years' delay? Because, so far as I can see, for the first time in the history of our jurisprudence, the Congress tried to put cap and gown on a Commissioner of the Interstate Commerce Commission and tell him and tell me that he can make a new contract for me with my creditors. And I resent it. I do not believe any citizen in this nation should stand for that until he has [fol. 77] fought it to the very finish. That is the principle upon which I proceed, and that is the principle and that is the reason why there have been ten years' delay, and, Heaven knows, it should be ended! Now, that has been my fight here, and I do not apologize for it. I am happy to fight for that principle. Repeatedly in the reports of the committees of Congress, both House and Senate—reports which have matured in legislation, voted for and passed by the entire Congress—the answer was always given as between speed and confiscation on the one side and delay and justice on the other, but nothing can be said for delay and confiscation. So much for that.

Now, what Your Honor has before you now and has had for some time is an administrative plan from the Interstate Commerce Commission. There is one thing that has been said. The Supreme Court has been just as generous and just as liberal as it can be in giving free scope to the imagination of the Commission. But you have a plan before you, and that was formulated on a record actually closed in 1941. Now, we did have a hearing here on a collateral question, and Mr. Swan testified, as he always does, directly and clearly, and on that application for the payment of interest he had something to say about the Geneva plant, but at that time the Geneva plant was being operated under Government regulations. It required services, and there was a necessity for the equipment to handle its demands, but even [fol. 78] Mr. Swan did not know and could not testify that the Geneva plant with its great earnings would outlast the war. And when it came before the Commission, if they even looked at that testimony—they say it was sent down to the Commission—it was a trivial matter at that time, because in the way they were looking at things then the Commission could say, "Well, we just estimate and guess that there won't be any change in that situation." But today, factually, there is a change in that situation. Today that plant is in private ownership and in private operation, and it has its significance. But that is a radical change. Now, let's see what the Commission did. They sat in 1941, and they were allowed to sit in 1941 and substantially say that the recently experienced business activity in this country was going to be permanent. We are criticized because we use in this petition the word "permanent" when related to the business activities of today. Speaking as of that time, the Court has allowed them to guess and prognosticate, and then, when the war earnings came in, they were allowed to say, "Well, this is not significant. What is this? This is just more earnings. This is not any change in the basic economy, but it is just more earnings, and earnings, high or low, are not significant. We are looking for the basic business activity, and we project and tell you that after this war that basic business activity that we have assumed is going to continue." The Supreme Court said, "All right, [fol. 79] you can guess at that, and we will take your guess, and nobody can guess any better." But today that

guess is proving false, and the very basis of the rationale used by the Commission on this plan is wiped out like that.

Now, we come back to a consideration of the Atchison case—the case of the Atchison, Topeka and Santa Fe against the United States in 284 U. S., and I am going to begin my reading of it at page 258. Now, let me state this case as I understand it. I may not get the parties right because I do have difficulty in retaining.

Before the depression a very elaborate investigation was made by the Interstate Commerce Commission of the roads, I think in the western classification, but, of course, it wouldn't matter whether it was the west or the east. They held the matter for some months, and maybe some years, and finally the depression having come upon us, the Commission handed down its opinion and its order establishing rates. On February 18th, 1931, the railroads filed a petition with the Commission for a rehearing, and the substance of their petition will be referred to in the quotations from Justice Hughes. The petition was denied by the Commission, and the Court was then asked to enjoin the Commission, for the reasons that are stated by Justice Hughes in his opinion. He says.

> "The petition set forth the passage of the Hoch-Smith Resolution and the order of the Commission in [fol. 80] relation to the rates on deciduous fruits from California, which had been held by this Court to be invalid because based upon an erroneous construction of the Resolution, and the carriers charged that, in making the reports and order here in question, the Commission had proceeded upon a like misconception of its powers. Stating the substance of their petition for rehearing, the carriers further charged that the denial of that petition, in view of changed conditions, was itself an abuse of administrative discretion and, by depriving the carriers of the hearing to which they were entitled, constituted a denial of due process in violation of the Fifth Amendment of the Constitution of the United States."

That is stating the contention of the railroads that they were entitled as a constitutional right to a rehearing based

on the changed conditions, to which reference will be made later in this opinion. The opinion continues:

> "In their answers, the United States and the Commission denied that the action of the Commission was in any respect unauthorized or unlawful, and on the contrary alleged that the Commission had carefully considered the evidence before it in the light of its experience and that the evidence fully supported its order.
>
> "On the application for an interlocutory injunction,—"

—that is where they applied to the Court for an injunction enjoining the order of the Commission because the Com-[fol. 81] mission had refused to recognize this constitutional right—

> "On the application for an interlocutory injunction, the evidence taken before the Commission was not presented to the District Court. Affidavits were submitted by the carriers which were addressed to the effect of the order upon their revenues. The District Court made findings of fact, reciting the findings set forth in the report of the Commission and, in the view that these were conclusive in the absence of the evidence, and that no errors of law had been committed, the application was denied.
>
> "The appellants contest this conclusion, contending that the report of the Commission and concurring opinions of Commissioners disclosed that the Commission had misapprehended its authority under the Hoch-Smith Resolution and that the Commission had failed to make the findings which were essential to support its decision under the applicable law; that this was shown by the special and extended consideration given by the Commission to the depression of agriculture and the lack of other and proper foundation for the order; that the Commission had not performed its duty to consider and apply the provisions of Paragraph 15(a) of the Interstate Commerce Act and had exceeded its power by resorting to different

standards from those established by Paragraphs 1 and 15 of the Act; and that the ultimate finding of the Commission, expressed in the words of the statute, [fol. 82] that the existing rates were unreasonable to the extent that they exceeded the rates prescribed, was not in itself sufficient to support the order, as it otherwise appeared to have been erroneously based.

"We do not find it to be necessary to consider these contentions, and the counter arguments advanced on behalf of the Commission, or to review the Commission's reports, as it is sufficient for the present purpose to deal with the fundamental question presented by the action of the Commission in denying the appellants' second application for a rehearing. Ordinarily, a petition for rehearing is for the purpose of directing attention to matters said to have been overlooked or mistakenly conceived in the original decision and thus invites a reconsideration upon the record upon which that decision rested. The second petition for rehearing, in this proceeding, was not of that character. It was of the nature of a supplemental bill. It presented a new situation, a radically different one, which had supervened since the record before the Commission had been closed in September, 1928. It asserted that whatever might be the view of the order when made, and upon that record, a changed economic condition demanded reopening and reconsideration. The carriers insisted upon this reopening as a right guaranteed to them not only by the Act of Congress but by [fol. 83] the Constitution itself.

"There can be no question as to the change in conditions upon which the new hearing was asked. Of that change we may take judicial notice. It is the outstanding contemporary fact, dominating throughout and action throughout the country. As the Interstate Commerce Commission said in its recent report to the Congress, 'a depression such as the country is now passing through is a new experience to the present generation.' The Commission also recognized in that report 'the very large reductions in railroad earnings which have accompanied the economic depression,' and

stated that 'the chief cause of these reductions has been loss of traffic.' For 'in such depressions the railroads suffer severely. Their traffic is a barometer of general business conditions.'

"It is plain that a record which was closed in September, 1928—relating to rates on a major description of the traffic of the carriers in a vast territory—cannot be regarded as representative of the conditions existing in 1931. That record pertains to a different economic era and furnishes no adequate criterion of present requirements. While the effects of the widespread economic disturbance have had a progressive manifestation, they had been sufficiently revealed in February, 1931, when the second petition for rehearing was made, to compel the conclusion that the record of 1928 [fol. 84] afforded no sufficient basis for the order of the Commission. The facts were set forth in the carriers' petition. They pointed out the grave reductions, in traffic and earnings, from which they were suffering, that their net operating income for 1930 was over $100,000,000 less than their average annual net operating income for the five years preceding, and that their credit was seriously impaired. At the time of this petition, the order revising the rates on grain and grain products in the Western District had not yet become effective, but the Commission stood upon the record of 1928 and, without reopening the proceeding or taking further evidence, provided that its order should become effective on June 1, 1931. In justification of this course, it is urged on behalf of the Commission that its determination had been reached after regularly conducted and protracted hearings in which carriers and shippers had cooperated and that the adjustments related not only to the level of rates but to the relation of rates and to discriminatory and wasteful practices, and that a reopening would have meant further lengthy proceedings. It is said that 'in performing its legislative function of prescribing reasonable rates, the Commission necessarily projects into the future the results of a decision based on the conditions disclosed in the record,' and that its determination 'cannot reflect accurately fluctuating conditions.' These sug-

[fol. 85] gestions would be appropriate in relation to ordinary applications for rehearing, but are without force when overruling economic forces have made the record before the Commission irresponsive to present conditions. This is not the usual case of possible fluctuating conditions, but of a changed economic level. And the prospect that a hearing may be long does not justify its denial if it is required by the essential demands of justice.

"We are thus brought to the fundamental considerations governing the authority of the Commission. It has broad powers and a wide extent of administrative discretion, with the exercise of which, upon evidence, and within its statutory limits, the courts do not interfere. The important and salutary functions of the Commission to enforce public rights are not to be denied or impaired. But the Commission, exercising a delegated regulatory authority which does not have the freedom of ownership, operates in a field limited by constitutional rights and legislative requirements. Its duty under Paragraph 1 (5), 3 (1), and 15 (1) of the Interstate Commerce Act with respect to the prescribing of reasonable rates and the preventing of unreasonable or unjustly discriminatory or unduly preferential practices, has not been changed by the Hoch-Smith Resolution. Ann Arbor R. Co. v. United States, 281 U. S. 658, 669. The legal standards govern-[fol. 86] ing the action of the Commission in determining the reasonableness of rates are unaltered. In the discharge of its duty, a fair hearing is a fundamental requirement. Interstate Commerce Comm. v. Louisville & Nashville R. Co., 227 U. S. 88, 91. In the instant proceeding, the hearing accorded related to conditions which had been radically changed, and a hearing, suitably requested, which would have permitted the presentation of evidence relating to existing conditions, was denied. We think that this action was not within the permitted range of the Commission's discretion, but was a denial of right. The order of the Commission which was thus made effective, and the ensuing supplemental order, cannot be sustained.

"The order of the District Court refusing an interlocutory injunction is reversed, and the cause is remanded with direction to grant the injunction as prayed."

There could not be a clearer picture of what the situation is now and what we have a right to have the Interstate Commerce Commission consider. This Court cannot consider here and say whether there will be a change in the plan or there will not be a change in the plan. That is a question for the Interstate Commerce Commission, and no man can tell them what to do. You can tell them, yes, that they must change the plan, but they do not have to change it. Your Honor suggested a change to them at one time, and they exereised their prerogative and disregarded [fol. 87] your suggestion. That is their responsibility.

Now, what in the light of these changed conditions? What is the view of these committees in Congress? Your Honor is familiar with those reports. You know that one after another of the members of the Committee incorporated in their report the recommendation that this plan should come back for furtl.er consideration, and I want to quote the language of Mr. Mahaffey, who is the high priest of reorganization on the Interstate Commerce Commission. This is taken from Report No. 1170 in the Senate, 79th Congress, Second Session, at page 21. Mr. Mahaffey is quoted in there as saying:

"The changes in credit conditions have now made those four per cent First Mortgage Bonds of the roads covered by Section 20(c) such that they generally can be readily refunded when the property is back in solvent condition. If they can be refunded at, say, three per cent, that of itself, as Mr. Purcell indicated, affords a basis for an increase in capitalization, because the total of the fixed charges is one of the important elements in fixing the capitalization. That and other changed conditions in these cases probably should have consideration where they can be shown to have changed to an important extent. It was with that in mind that I said, 'If you are convinced, as I think you might well be, that these changed conditions

[fol. 88] should be looked into and evaluated, you might like by statute to send the proceedings in which you find them back for further consideration.' ''

But that is not in a statute. It is not yet a statute. It needs the recognition of the Court of the Commission's place in that picture, of the duty of the Commission, because of this brigading.

The Court: We will adjourn at this time until two o'clock.

(Whereupon, at the hour of 12:15 o'clock, p. m., the hearing stood in recess.)

[fol. 89] Pursuant to recess, the hearing was reconvened at the hour of 2:00 o'clock, p. m., October 30, 1946, whereupon the following proceedings were had:

The Court: All right, Mr. Hodges, you may proceed.

Mr. Hodges: Reference was made that Section 77(b) has an express provision that after confirmation the Court may modify the decree. I submit that was merely a reaffirmation and restatement of the rule as to the inherent power of the bankruptcy court or a court of equity to modify any decree that it might have made up to the time of its final disposition of the case. That argument and those considerations go to moves to change the Court's decrees on the record made or upon newly discovered evidence in support of the record made, but they do not go at all to the problem of an application to the Court, however written up or however designated, but in its essence as was designated by Mr. Justice Hughes as in the nature of a supplemental bill. It is a bill filed containing matter which might be presented in one way or another.

Now, I call your attention to a case in 153 Fed. (2d), at page 296, which is a decision by the Circuit Court of Appeals of the Second Circuit, and I call it to your attention because of the long list of citations which is given in Note 2 on page 299, in support of the proposition that

no order in a bankruptcy proceeding is final, in the sense [fol. 90] that it cannot be reopened, until the proceeding has been terminated. There is a long list of cases cited, and the leading case is the case of *Wayne United Gas Co.* vs. *Owens-Illinois Gas Co.*, 300 U. S. 131, which I have here, a case in which the Supreme Court established the proposition that a bankruptcy proceeding which had been dismissed could be reopened, and they discussed the rule which I have laid down, and it is not conceivable that these inherent powers of the Court and the inherent rights of the litigants could be denied by any language used in Section (f) or by Section 77 of the Bankruptcy Act.

Now, in this opinion of the Supreme Court in the D. & R. G. case we have some interesting language which I will read to you. That case was decided June 10th, 1946, and no modification of that opinion was rendered on the recent Monday. I assume that it would not be improper for me to say that I have a telegram stating that the Chief Justice and Justice Jackson were not present at the original hearing of the D. & R. G. case and did not participate in the denial. Justice Frankfurter filed on that most recent date his dissenting opinion.

On that point, I might suggest that on the petition for rehearing the debtor presented matters which my friend Mr. Gibson referred to—I couldn't hear him, but that was my fault and not his—but I have no reason to think that he did not correctly state what the petition said—in good faith the debtor presented to the Court an opportunity on [fol. 91] rehearing to consider matters which were not in the record before them and at the time of their decision. There is no assurance or presumption that they will consider those matters and consider anything else than the record upon which they based their original decision, and the fact that they did not on an application for rehearing branch out into a consideration of some matters, particularly the legislative situation, and give a decision on it, is of no consequence or significance whatever. It is like a petition for a writ of certiorari in that respect. The Court does not need to give heed, and its refusal to consider is not in any sense a ruling upon the question which they had discretion to consider but did not consider.

Now, I will come back to the decision of June 10th, which is the opinion of the Supreme Court in this case. I have what I suppose will be the Supreme Court official copy of the opinion, and I am reading from page 18. The Court said:

> "Assuming that the courts, as courts with equity powers in a bankruptcy matter, might set aside a plan, fair and equitable when adopted by the Commission, merely on account of subsequent changes in economic conditions of the region or the nation, it should not be done when the changes are of the kind that were envisaged and considered by the Commission in its deliberations upon or explanations of the plan" of the Commission. That is the end of the quotation, and [fol. 92] the words "of the Commission" are not a part of the quotation.

You will note that this Commission envisaged the war which was beginning. They were asked to envisage a higher level of business activity in the United States following the war. It was, according to the Supreme Court, the function of the Commission to do the envisaging or the guessing. Obviously, they had taken the position that a few fluctuations in earnings without change in basic economic conditions do not disturb their assumption of basic economic conditions. There was no demonstrated change of basic economic conditions before the Commission, and the Court leaves that open for a proper presentation at the proper place and time of changed economic conditions. That is done by the Court in the opinion affirming the order of this Court confirming the plan of reorganization.

I am going to state to you what I think and believe and submit is a correct statement of the situation today after this decision. The effect of unanticipated change of economic conditions after confirmation and the propriety of action by the reorganization court to protect the interests of junior creditors also has not been judicially determined finally.

The Court: Who said that? What are you quoting from?

Mr. Hodges: I am not giving that as a quotation. I am giving that as my statement of what I conceive to be the status of that question today before the courts of the United States.

[fol. 93] Now, we have made and filed a petition here in which we set forth, we think adequately, and we assert and we tell this Court that there has been a change in economic conditions and a basic change in economic conditions. Without waiving the presentation of all significant features of the change, we set forth some two or three specific features of the change. That is the pleading and that is the statement of fact upon which this hearing turns.

Reference has been made to factual matters not set forth in this petition. I challenge them all, but they have no place here in this hearing.

The Court: They are in the record in the case. I suppose we can review this whole record, can't we?

Mr. Hodges: The facts that have been stated here today are not in the record.

The Court: Such as what, specifically?

Mr. Hodges: Such as the Dow-Jones averages, and what they call the fluctuation in interest rates, and things that directly are intended to contradict the allegations of this petition. I believe Your Honor can examine the whole record in this case, but in examining particularly this report that Mr. McAllister called your attention to, I object that that is factual matter filed ex parte, not in response to this petition, upon which we have had no right of cross examination or analysis. It is there, but it must be exam-[fol. 94] ined with those very essential things in mind, and if it tends to dispute any allegation in this petition it cannot be considered a traverse of the facts set forth in this petition because it comes before the Court in that way. Before that report is to be considered we ask a hearing and an opportunity to analyze it and find out why, if there is any significance to any of the figures, the figures happen to be as they are.

Now, in this petition we say:

"The vital equity power hereby invoked is the power to do justice to any and all parties in interest at any stage of the proceeding and to prevent the entry of, or to vacate and set aside, a decree or determination which may be unfair, inequitable or unjust by reason of the discovery of new evidence or by reason of changed circumstances or a fundamental alteration of economic conditions"—that is what is referred to by the Supreme Court—"or by reason of any new factor or substantial change of a former situation or status which causes such decree to be one of doubtful propriety and calculated to disturb and distress the conscience of the Court. In the opinions of the Supreme Court of the United States rendered March 15, 1943, in the case of *Ecker* vs. *Western Pacific Railroad Corporation and others*, and in the case of *Group of Institutional Investors* vs. *Chicago, Milwaukee, St. Paul and Pacific Railroad Company*, and also in the opinion of the Supreme Court of the United States rendered [fol. 95] June 10th, 1946, in the proceeding in which this petition is filed it is recognized that a change in economic conditions may require a re-examination into the present fairness of a plan of reorganization previously formulated by the Interstate Commerce Commission and approved or confirmed by the Court.

"3. By order or decree dated October 25, 1943, this Court approved, and by order or decree dated November 29, 1944, confirmed a Plan of Reorganization for the Debtor which had been certified to it by the Interstate Commerce Commission on June 14, 1943, and which was based upon a record formally closed on May 20, 1941. In the period between May 20, 1941, when the record in this proceeding was closed by the Interstate Commerce Commission, and August 13, 1946, when the President of the United States published the Memorandum of Disapproval of S.1253 which had been presented to him on August 1, 1946, pursuant to Section 7 of Article I of the Constitution of the United States, there have occurred in the United States of America and in the section or territory thereof served by the railways and facilities of the Debtor a series of changes

in the National economy, in the railway industry and in the earning power of the Debtor's properties and in legislative and executive action since the confirmation of the plan interpretative of what is 'fair, equitable and [fol. 96] in the public interest' which have completely undermined the foundation and the philosophy of the plan of reorganization for the debtor certified by it to this Court on June 14, 1943, and in consequence thereof said plan is not now, if ever it was, a fair and equitable plan conforming to the standards and requirements prescribed by Section 77 of the National Bankruptcy Act.

"4. The petitioner, without limiting or restricting the scope of this petition as embracing all changes in the national economy and in the railway industry and in the earning power of the debtor's properties, hereby specifies the following as factors which should be fully explored in an open hearing before finality may properly be accorded a plan of reorganization for the debtor formulated as early as June 14, 1943, upon a record closed as early as May 20, 1941:

"(a) The decline in money rates to a level far below the rates prevailing at these dates;

"(b) The recent public offering by the Government and purchase by private capital for private operation of the steel plant at Geneva, near Provo, Utah, which had been constructed by the Government in the exigencies of the war at a cost in excess of $200,000,000;

"(c) A permanent elevation of the national income through intensified industrial activity involving for the indefinite future a greatly increased demand for railway [fol. 97] transportation.

"Each of these factors which will be elaborated in its order under a distinguishing caption alone is sufficient to render obsolete, unfair, inequitable and unjust a plan of reorganization developed on the basis of pre-war standards and pre-war data and that taken collectively they create a presumption of obsolescence so nearly conclusive that a Court of Equity could not properly ignore it."

And then we set forth in detail an affirmative statement of the decline in money rates, and I will not read that all in detail, but it sets forth the decline in money rates and the cases in which the Interstate Commerce Commission authorized securities to be issued and sold at rates of interest reflecting a decline in interest rates. That decline in interest rates, we say, if recognized in new securities of this company will increase, on the basis of the estimate of income used by the Commission on the old record of $43,974,000, the available securities for distribution.

Then, reference is made specifically to the Geneva plant and the fact that not until now, or subsequent to the making of the record and subject to the confirmation of this plan by this Court, and subsequent to the hearing in the Supreme Court, the Geneva plant has become permanently subject to private ownership and operation, and that in itself is a vital thing in affecting the income of the Denver and Rio Grande.

[fol. 98] Then, Paragraph (c) is the post-war national income, that is set out specifically. All through these proceedings it has been contended before the Commission that, predicated upon the known facts, the gross income of railroads bears a fairly constant statistical relation to the national income, and that they should forecast the earning powers of a railroad with reference to a forecast of the national income. That they have not done. Now, the national income is here. It is a fact. Now, the basis which they have been assuming was the depression income, gross income, as the standard of income for the future of this road. Now, that foundation is gone, and there is actually here a new level of national income, the result of the regearing of the economy of this country, and there is an allegation in here that "the reasonably anticipated gross income of debtor's property for the year 1946 will be far in excess of any pre-depression income, and on the basis of any operating ratio heretofore experienced on the property there should be realized therefrom distributable income far in excess of any amount necessary for the service of debtor's obligations." Those are the allegations as to the change in the national economy. They are as effective allegations and as significant as the allegations in the Atchi-

son case to which I called Your Honor's attention this morning. There isn't anybody around who is not aware of the fact that the national income and the national economy are on a level undreamed of heretofore.

[fol. 99] Now, you can say to me, "But I am interested in the net of this railroad." We make no allegation as to the net of this railroad. We make the allegation as to the gross, which will exceed any gross income that this road has enjoyed pre-depression.

The Court: The ability to pay interest on new securities depends upon the net and not on the gross, does it not?

Mr. Hodges: Yes, you know that is true, but that is not the answer.

The Court: I think that is an important factor.

Mr. Hodges: No, that is not the answer at all, any more than it was the answer when we were piling up money here in the war period, earning two or three or four times our fixed charges. What was their answer then to that? They said, "Oh, no, that is temporary. That does not reflect the economic level. No, that is exceptional." Now, we are talking about the economic level. What is the significance of that economic level? I know what their operating ratio is today. I know what the operating ratio of other railroads is. I know of one railroad in the country that has got a higher operating ratio, just one. I know a lot of railroads in the country that have had less decline in gross and a much better operating ratio. I know one railroad that has got a less decline in gross and a greater operating ratio. [fol. 100] But that does not mean anything. Now, what is the situation?

When we talked during the depression about this national economy—it wasn't discussed much before the Court but it was discussed before the Commission—and about the earning power, it was perfectly obvious that we were talking to a Commission that had the powers of the Government to increase the rates for services of the railroad. That we know as a part of the knowledge of the law of the land. But in that day of very deficient national business, it was quite obvious that an increase in the rates would be

more than offset by the loss of a critical part of the business, because a small loss was very critical in those days of poverty of supply and demand.

Now, what is the situation? If this was before the Commission today, would they tell us, when we have got this share of this national income, and the power to give us compensation for that service equivalent to the compensation which other activities in the economy are receiving, that they will refuse us that compensation and confiscate us? They no longer have the excuse that to give us adequate compensation will deprive us of business which will reduce our revenue more than the increased revenue derived from the rates, and when that time comes before the Commission, through the combination of two orders if they do not give us relief—one, the order confiscating us, and the other the order denying us rates—we have got a beautiful case of [fol. 101] confiscation. That is the fact of the matter, and that is the significance of this change in the economy, and the question is not whether today on this volume of business we are making a net. The question is, on this volume of business, compensated equivalently with the compensation for other services in this economy, we will then have a net which will permit us to take care of a fair and reasonable interest charge or preferred stock charge on our property. That will be the question then. It is a new question, and it is not a question that they have had before them before.

Now, there are people that say, "Suppose I sit back and see what happens? Yes, we are doing a lot of business. Yes, there is a great demand for our services. Yes, we are a useful transportation unit in this nation. Yes, we are in fine condition. Yes, we can do it as economically as anybody else, or pretty close to it. But what difference does that make? We are going to pay the high wages and high material costs and we are not going to have any adequate compensation for those services." Is that the picture? Is that what the change in national economy means? Of course, it isn't. Perhaps our whole economy is going into collapse, but that is not an assumption which the Court can make. We have got this high wage problem, and I doubt not but when we look at the annual report for 1945 we will find reflected there very conspicuously the increased labor cost.

[fol. 102] One picture is that it is a permanent impairment of our earning power, and as for another picture, I would like to give to you in just one sentence—I find that an Englishman can state things so well, and this is a statement by the Right Honorable Herbert Morrison in the English cabinet—he has got the same situation there that we have here, and the unions are forcing high wages and the Government has given them high wages over there. But, let's see how he characterizes it. Maybe he is right. He says: "Some may be disturbed about what they regard as a tendency to buy industrial peace at the cost of wage increases which have yet to be matched by extra productivity." In other words, their high wages there are a sight draft on the future productivity of the new wage situation. We have got to expect that that will be the answer here. But, with the basic economy, and the basic activity in business, and the basic demand for the services of this railroad, which it is now fulfilling but which it could not fulfill if it were not for the investment by these people who are being wiped out, the situation is that the cloth is there now to cut, but it was not there when this record was being considered by the Commission in the formulation of the plan which Your Honor has confirmed. We are entitled to ask the Commission—they are the experts in this matter—we are entitled to ask, "Now, if the foundations are all gone, if your basis of reasoning is wiped out, and the things that you imagined have not materialized, and something else quite different has materialized, now, gentlemen, members of the [fol. 103] Commission, what are you going to do about this situation, which is a vital change in the economic conditions?"

So, I believe that we have the right to present to this Court this petition, a supplemental bill in nature, asking that the cause be referred to the Commission for them to give consideration to these changed economic conditions, which the Supreme Court has reserved for consideration, from the opinions in these cases. I thank you.

The Court: Does anyone else want to argue in favor of this motion before we hear replies? Do you want to be heard, Mr. Shafroth?

Mr. Shafroth: Yes, Your Honor, very briefly.

The Court: All right.

Mr. Shafroth: It seems to me that Mr. Gibson so thoroughly covered the matter this morning and has so completely in his original argument answered the contentions now made by Mr. Hodges that it would be a waste of Your Honor's time to reply to Mr. Hodges. The arguments that have already been so effectively presented by Mr. Gibson so thoroughly demonstrated that there is nothing in this petition justifying a reconsideration of the orders already made in this case.

I might say briefly that it seems to me that Mr. Hodges' arguments rest on two fundamental theories. The first is the theory that the law itself is wrong, and second, his theory that Your Honor and the Supreme Court were in error in failing to give sufficient consideration to the [fol. 104] economic conditions which he says exist.

It is very important that this matter be expedited. It has been in the court for ten years. If there ever has been a thorough consideration of a case and a complete determination of the matters here presented, it has occurred in this case, and when the Supreme Court on Monday handed down its final order denying a rehearing, it seems to me that that was a mandate to this Court to proceed with all expedition to carry on the reorganization called for in the plan that had been provided by the Interstate Commerce Commission, and approved and confirmed by this Court and affirmed and approved by the Supreme Court of the United States.

There is pending a further motion before Your Honor today involving the question as to whether or not the trustees should pay the expenses of expert witnesses whom Mr. Hodges desires to bring out for a further hearing on this motion.

The Court: That motion is not before the Court today, is it?

Mr. Shafroth: That is a motion set for today, I believe.

Mr. Hodges: It is set, Your Honor, but I did not refer to it because I thought we were only to speak to the matter under discussion.

Mr. Shafroth: I am not attempting to argue that. I [fol. 105] am just saying that if Your Honor deems that there is nothing justifying a reconsideration of these former orders in this case and a sending back of this matter to the Interstate Commerce Commission, it would be a supererogation to have an argument and a discussion as to whether witnesses should come out for a hearing that was not to be had.

It therefore seems to me important to have this matter disposed of as soon as possible and avoid further delay and further unnecessary argument.

The order that we submitted to Your Honor has one correction, in which we made an error in putting the date as the 28th instead of the 29th. If Your Honor will note in the third line, where it specifies the filing of the reorganization committee's motion herein as October 28th, that should be October 29th.

That is all, Your Honor.

The Court: Is there anyone else to be heard?

The Court feels that this matter must be decided sometime and the litigation ended.

The Court has had long experience with the affairs of this railroad. This is the second receivership since I have been on the bench. That was an equity receivership in 1920, and, as I recall it, the railroad came out of that receivership with a burden of fixed charges and debt larger than when it came into the court for reorganization.

[fol. 106] The earnings of this railroad as shown by the record are very illuminating to me. The inability of this railroad to earn and pay interest on the large debt it has had to support is the crux of the whole situation. Boiled down, this is an attempt by holders of securities wiped out under the plan to get new securities in place of those eliminated by this reorganization plan.

According to the Supreme Court, the best test to be applied in a railroad reorganization in fixing the amount of securities that may be issued under any plan is the net earnings of the property over a given period of years. In addition to the figures given by Mr. McAllister this morning, I have some figures here showing that in 1943 the total operating revenues of this property was $46,646,000, and in 1945 they had increased to $52,360,000, and in 1946 to date, the current year, they are $33,148,000.

Now, after deducting from these amounts the expenses of operation the road had in 1943 a net operating income of $11,996,000, and in 1945, $8,688,000, and in 1946 to date, $1,982,000.

This shows to my mind that the large revenues this road temporarily enjoyed during the war period are a thing of the past and cannot be counted upon in the future or used as a basis to support any increase in the amount of securities over that the property will be called upon to [fol.107] sustain under the present plan of reorganization.

I have often thought that, had I known at the time the plan was approved a year or more ago that the operating expenses, particularly the item of labor, had not reached a peak but would be greatly increased, as they have since that time—and to date there is no indication that they will not be increased in the future, and the probabilities are they will be—I doubt very much if I would have been justified in approving this plan without a further permanent increase in revenue, which is not the case.

In other words, the present earnings will not sustain this financial structure unless there is a change in the income situation. The earnings have been steadily falling off ever since the conclusion of the war and it shows the large revenues were temporary and due to war activities alone.

So, I fail to see any ground upon which it can be said that the earnings of this property will justify the issuance of any further securities. If they were issued they would be absolutely valueless because of the inability of the property to earn or pay any return thereon.

There are other factors that affect the earnings of this property. A reference has been made, for instance, to the Geneva plant, which has been discussed here this morning, and with which we are all more or less familiar. The Geneva plant is not yet in full operation, and I don't know [fol. 108] when it will be. But, assuming that it will be under its new management, it is the estimate of the traffic department of this property, based on discussions with the Geneva people that the gross revenue of the Denver and Rio Grande connected with the Geneva plant will approximate $1,682,000 annually on the basis of present rates and the contemplated production, if the full ex parte 162 freight rate increases requested are granted. On the basis of a 75 per cent operating ratio and after allowance for taxes at present rates, this would make a net income to the Rio Grande of approximately $300,000 a year. Against this, however, must be charged the loss of long-haul traffic on steel and steel products from the East which the road would lose, which heretofore has moved to the West Coast territory from the CF&I and eastern or Pittsburgh plants. In other words, any increase in revenue from the Geneva plant would be in part, at least, offset by the loss of traffic from the Colorado Fuel and Iron Company and other steel establishments in the East whose product would be replaced on the Pacific Coast by the Geneva plant product, so it would not amount to much of an increase in net income.

Another factor is the coal traffic. We all know that the coal traffic still represents the Rio Grande's most important single item of traffic. In that respect, we cannot overlook the fact that the Rio Grande's gross revenue from coal has been on a sharp decline during the period from 1921 [fol. 109] to 1941, dropping from $7,224,000 to $3,810,000, or 47 per cent.

Then, another factor, of course, that we must consider is the transcontinental traffic. It is a fact with respect to this property that it is now more of a bridge railroad than it is a railroad moving business originating or consigned to points on the Rio Grande. That is to say, every year the amount of business that it receives on its eastern connec-

tions and carries through and delivers to its connection at the west is increasing at the expense of the local business.

Now, during the war the railroads have had an advantage due to the closing of the Panama Canal. Some observations on that situation, I think, are in point. Fifty per cent of the nation's transcontinental traffic moved through the Panama Canal in 1940. Due to the war and the closing of the Canal this profitable business was shunted to the railroads. It must be assumed that resumption of normal shipping operations through the Canal will mean that these transcontinental carriers by water will regain at least a substantial portion of their pre-war traffic at the expense of the railroads.

So I see no reason for any belief at all that the prospects of the operation of this property over any period of years will in any sense justify any increase in the amount of securities which it can maintain and pay interest on.

Of course, the road might issue more preferred stock or common stock, without any guarantee of any return on [fol. 110] them, but that would be of no advantage to securities holders who have been wiped out.

In that connection the Supreme Court, in its opinion by Justice Reed, says:

> "At this point, we restate our conclusion reached in the former cases that the Congressional Authority to the Commission to eliminate valueless claims from participation in reorganization is a valid exercise of the Federal bankruptcy power. Section 77 was directed at the relief of debtor railroads. Liquidation in depression periods meant that large portions of debts, as well as stock interests in the properties, would be irretrievably lost to their holders, while reorganization on a capitalization that estimated what normal income would support meant the salvage of sound values. We see no more constitutional impediment to the elimination of claims against railroad debtors by the Interstate Commerce Commission's determination

of values with judicial review as to the sufficiency of the evidence and compliance with statutory standards than we do to their elimination by an accepted bid in a depression market."

Thus, the Court reiterates the theory of Section 77 and that it is the duty of the Courts and the Commission to shake out valueless securities and not attempt to burden the property in the future with securities not justified by earnings.

[fol. 111] If the history of this railroad before reorganization teaches us anything, it is that over-capitalization has been the cause of these successive bankruptcies in respect to this property. As I have stated heretofore and state again, in my opinion this plan goes to the very limit in attempting to set up a capital structure justified by the earnings when we consider the past, present and future prospects of earnings of this property.

However, whatever my views may be on the factual situation, this motion of Mr. Gibson's is nothing more than a demurrer to Mr. Hodges' petition for an order to reopen this whole reorganization before the Interstate Commerce Commission and, as I have said, the case must be decided sometime. This case has been in court since 1935—a much longer period than contemplated by the Bankruptcy Act or the parties at the time the proceedings were initiated—and most, if not all, of the questions presented and raised in this petition have been thoroughly rehashed time and time again, not only before the Commission, but in this court. On appeal our Circuit Court of Appeals took cognizance of some of these arguments in their opinion. I mention this only because the decision of that Court reversing the opinion of this Court presented these questions very squarely to the Supreme Court, and, if I read the opinion of the Supreme Court correctly, they simply passed upon these contentions which were advanced and which were [fol. 112] adopted by the Court of Appeals. I feel bound by the findings of the Supreme Court, irrespective of any personal opinion I might entertain. All legal remedies have been exhausted, and the objectors have at all times had a fair hearing before the Commission and the Court, with a

full opportunity to be heard in making any kind of a record or argument they wanted, and it seems to me it is time for the opposition to this plan to bow to the inevitable.

Furthermore, I know of no rule by which this Court must take notice of or be guided by debates in Congress or recommendations or findings of its committees. They are not judicial in their nature. The Congress represents the legislative branch of the Government, and not the judicial, and until their views are put on the statute books, I do not believe this Court should allow itself to be influenced by these debates in the Congress, which are not conducted in accordance with rules of procedure that obtain in the judicial department of the Federal Government. Even if this so-called Reed bill, when passed, exempted this railroad from its provisions, so even if it had been approved by the President of the United States, we would not have been required to take any notice of it for that reason.

The Court now has before it the mandate of the Supreme Court, which is, of course, binding upon us and must be performed and carried out with due diligence.

This railroad should not be run by the Court. The [fol. 113] Court is not constituted to operate properties of this size or nature. For that reason, as soon as it is restored to the people that the law says are the new owners, the whole situation will be much clearer and the securities holders will be better off and more settled and know exactly what their rights are and what they are not.

Furthermore, in *Orten* vs. *Group of Institutional Investors*, 155 Federal (2d), 489, certiorari denied by the Supreme Court, a case in the Circuit Court of Appeals of the Seventh Circuit, the identical question was presented and relief denied. The Court said there in regard to a similar question:

> "We are also of the view that the order attacked is non-appealable, inasmuch as it merely denied the motion to vacate the order of consummation. There is no appeal from the order itself."

The Court then went on to say that they were not persuaded by the appellant's argument that its knowledge of

pending proposed legislation acquired subsequent to entry of the consummation order makes the general rule inapplicable in view of the uncertainty of the passage of the Reed bill or any similar legislation.

For these reasons the motion of Mr. Gibson to deny Mr. Hodges' motion for rehearing will be granted.

Mr. Hodges: Before signing that order, please look [fol. 114] and see, Your Honor, that order recites that you are hearing both the motion of Mr. Gibson and the motion of Mr. Burgess, and the motion of Mr. Burgess is not being heard today.

Mr. Burgess: My motion was almost identical with that of Mr. Gibson, except that it undertook to set forth some of the matters that we believed the Court should judicially know. My motion was that on its face your petition should be denied.

Mr. Hodges: If you are joining in supporting Mr. Gibson's motion, that is all right, but not your own motion, which is something quite different. If Your Honor rules in favor of Mr. Gibson's motion, you have disposed of our petition, and that is all there is to it, and that is quite satisfactory to me as a matter of procedure, but to hold me to having taken up the matters in Mr. Burgess' motion, that is something different.

The Court: Does it make any difference whether it recites that or not?

Mr. Hodges: It does to me.

Mr. Gibson: May I say a word to the contrary? It ill becomes counsel for the debtor to say that amendments to pleadings may not be made in the interest of justice and in accordance with the rules of civil procedure. It is perfectly clear that the Insurance Group Committee and the Senior Indenture Trustees would be entitled to ask Your Honor today to amend our motion so that it would be in the words and figures of Mr. Burgess' motion, and no [fol. 115] objection could be made to that, because they both say the same thing but in different words. There are

no new issues being raised, but Mr. Burgess is entitled to file his motion, and it is to the interest of an orderly hearing and the regularity and the dispatch of this Court's business that the order should be presented covering both of these motions, and we respectfully ask the Court that the order be entered.

Mr. Hodges: I ask Your Honor to strike out from the preamble the words—"and of the reorganization committee herein, filed October 29th, 1946"—to the effect that Your Honor's order will be to dismiss my petition, and there will be no order on Mr. Burgess' motion.

Mr. Burgess: Your Honor, I have no serious objection to eliminating from the draft order the words "and the motion of the reorganization committee herein, filed October 29th, 1946," if that would meet Mr. Hodges' objection.

Mr. Gibson: Is it Mr. Hodges' intention to have another argument on the motion?

Mr. Hodges: Mr. Burgess has withdrawn it.

The Court: With respect to the order, I will strike out the words at the end of the second line and in the third line —"and of the reorganization committee herein, filed October 29, 1946." As so corrected, the order as presented will be signed.

Mr. Hodges: Now, if it please the Court, I shall file [fol. 116] forthwith, and we have here, a notice of appeal to the Circuit Court of Appeals, and that order having now been entered, and the notice of appeal to the Circuit Court of Appeals having now been filed—can we assume it is filed?

The Court: Yes.

Mr. Gibson: We object to the filing of that notice on the ground that Your Honor's order is not appealable.

The Court: That is a matter for the Court of Appeals to decide, isn't it?

Mr. Gibson: I think it is, Your Honor. We want to be clear, to make our position uniform at all stages of the proceedings.

The Court: The record may show that motion and the observation of the Court that that is a matter for the Circuit Court of Appeals and not for this Court.

Mr. Hodges: Then, I move this Court for an order staying execution of the plan pending the determination of the appeal by the Circuit Court of Appeals.

The Court: That motion will be denied.

Mr. Hodges: That motion is denied, and may the record so show?

The Court: All right.

Mr, Hodges: There is one further thing I want to call to Your Honor's attention, before court adjourns.

We took no evidence this morning on this motion. Your [fol. 117] Honor's opinion commented upon various matters which were not in evidence and which I am sure were not in the record. They sounded as though it was a report of some of the trustee's organization to you, because of the information and details which you mentioned, things which were not brought to our attention. I merely want it to appear of record, and we are aware of the fact that Your Honor was referring in your opinion to matters of fact which were not introduced in connection with our petition, and that our petition was denied without a trial on the facts. Some of the things that the Court stated I also have reports on but my reports do not coincide with Your Honor's report, but it seems to me that is entirely irrelevant as being grounds for a denial of our motion.

The Court: There was nothing stated by the Court which was not in the record made in this court and which the Court has a right to take judicial notice of on any aspect of this reorganization proceeding.

Mr. Hodges: Is there anything in the record as to the Panama Canal? I was not aware that those things were in the record.

The Court: If you will read the record I think you will find it, and if it becomes necessary, they can be pointed out to you.

Now, we still have your motion for allowance of an expense fund. Do you want to take that up?

[fol. 118] Mr. Hodges: There is no occasion for that, Your Honor, if we are not going to take testimony. I would rather let it stand. I think it might be that we might be entitled to some allowance for the expense of appeal. I might wish to take that up. I would not ask you for any allowance for counsel fees, but I might come in later and ask for the expense of appeal. That would depend upon what the expenses are.

The Court: All right. That matter will not be set for hearing now?

Mr. Hodges: No. And then, the matter of the hearing on the facts, which is set for November 7th, that, goes over, I assume. That is, I should say it was nullified by Your Honor's ruling today.

The Court: All right.

Mr. Hodges: Is that correct?

The Court: Yes, all right. If there is nothing further, court will be adjourned until tomorrow morning.

(Whereupon, at the hour of 3:30 o'clock, p. m., court stood in recess.)

[fol. 119] UNITED STATES OF AMERICA
DISTRICT OF COLORADO } ss.

I, Fred C. Lebhart, the Official Court Reporter for the District Court of the United States, for the District of Colorado, hereby certify the above and foregoing to be a true and correct transcript of the proceedings had in the above-entitled matter in said court at the time and place as set forth.

FRED C. LEBHART,
Official Court Reporter.

Filed Nov 6 1946 Robert B. Cartwright Clerk.

[fol. 120] CLERK'S ADDITIONAL CERTIFICATE ON SHORT RECORD UNDER RULE 75(j) OF THE RULES OF CIVIL PROCEDURE

UNITED STATES OF AMERICA
DISTRICT OF COLORADO } ss.

I, G. Walter Bowman, Clerk of the District Court of the United States for the District of Colorado, do hereby certify the foregoing pages, numbered from one (1) to eighty-two (82), inclusive, to be a full, true and correct transcript of the official Court Reporter's transcript of the proceedings had in open court on October 30, 1946, as requested by counsel as additional record to the record previously certified and transmitted under Rule 75(j) of the Civil Rules of Procedure, in a certain case lately in said court pending, entitled In the Matter of The Denver and Rio Grande Western Railroad Company, Debtor, No. 8669, as fully and completely as the same remain on file and of record in my office at Denver, Colorado.

In Testimony to the above, I do hereunto sign my name and affix the seal of said Court at the City and County of Denver in said District, this sixth day of November, A. D. 1946.

G. WALTER BOWMAN,

(Seal) Clerk.

[fol. 121] CLERK'S CERTIFICATE.

United States Circuit Court of Appeals, Tenth Circuit.

I, Robert B. Cartwright, Clerk of the United States Circuit Court of Appeals for the Tenth Circuit, do hereby certify the foregoing as a full, true, and complete copy of the transcript of the record from the District Court of the United States for the District of Colorado; a full, true, and complete copy of the transcript of trial proceedings had in said District Court; and full, true, and complete copies of certain pleadings, record entries and proceedings had and filed in the United States Circuit Court of Appeals for the Tenth Circuit in a certain cause in said United States Circuit Court of Appeals, No. 3425, wherein The Denver and Rio Grande Western Railroad Company, Debtor, et al. were appellants, and John Evans et al. were appellees, as full, true, and complete as the originals of the same remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Tenth Circuit, at my office in Denver, Colorado, this 6th day of November, A. D. 1946.

ROBERT B. CARTWRIGHT,
Clerk of the United States Circuit
Court of Appeals, Tenth Circuit,

By George A. Pease,
Chief Deputy Clerk.

(Seal)

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1946

No. 690

ORDER ALLOWING CERTIORARI—Filed December 16, 1946

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted. The case is assigned for argument on Monday, January 6, 1947.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(8156)

FILE COPY

No. 690

Office - Supreme Court, U. S.
FILED
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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

October Term, 1946

INSURANCE GROUP COMMITTEE, REORGANIZATION COMMITTEE, GUARANTY TRUST COMPANY OF NEW YORK, TRUSTEE, CENTRAL HANOVER BANK AND TRUST COMPANY, TRUSTEE, UNITED STATES TRUST COMPANY OF NEW YORK, TRUSTEE, and THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, TRUSTEE,

Petitioners,

vs.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT AND MOTION

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November 9, 1946.

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Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit and Motion.

Insurance Group Committee, as holders of affected bonds, Reorganization Committee, as the agency for consummating the reorganization of The Denver and Rio Grande Western Railroad Company, and the Indenture Trustees for each issue of senior affected bonds respectfully pray that a writ of certiorari issue to review an order entered in the United States Circuit Court of Appeals for the Tenth Circuit by Judge Phillips on November 2, 1946.

This case is a sequel to *Reconstruction Finance Corporation, et al.* v. *The Denver and Rio Grande Western Railroad Company, et al.*, ... U. S. ...., 90 L. ed. 1134 (June 10, 1946), where the Court affirmed orders of the District Court for Colorado approving and confirming a plan for the reorganization of the Rio Grande and remanded to the District Court for further proceedings. In obedience to the mandate of this Court, the District Court has been proceeding with the necessary steps to consummate the Plan during the month of December. Petitions for rehearing on the basis of alleged changes in conditions, all of which had been presented to this Court before the original decision, were denied by this Court on October 28, 1946. But within the same week, and on the basis of the same contentions so rejected by this Court, Judge Phillips, of the Circuit Court below, entered a summary order on November 2, 1946, staying until further order of that court all proceedings for the consummation of the Plan.

This Petition is filed to ask speedy review of that action in this Court and the speedy entry of an order setting aside Judge Phillips' stay, in order that the mandate of this Court may be forthwith obeyed and the Plan be consummated in accordance with it. The prayer is also to bring the whole

cause before this Court before judgment so that final relief may be forthwith granted, vacating the stay, dismissing the appeal below from the District Court's order of October 30 denying a rehearing (or, in the alternative, summarily affirming the District Court's order of October 30) and granting the other relief referred to in the "Prayer and Motion" below. At the same time with this petition, there is filed a petition for writs of mandamus and prohibition so that the relief sought may be granted on any basis.

OPINIONS BELOW

No written opinion was delivered below, either in the District Court or in the Circuit Court.

The District Court order, containing an opinion (R. 14), and its oral remarks upon entering the order (R. 77-83) are not reported.

The stay order entered in the Circuit Court (R. 27-28) is not reported.

JURISDICTION

The stay order of the Circuit Court was entered on November 2, 1946. The order of the District Court was entered on October 30, 1946.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C., §347(a)).

STATUTE INVOLVED

The issues involve Section 77(f) of the Bankruptcy Act (11 U. S. C., §205(f)), quoted in its entirety in the Appendix.

QUESTIONS PRESENTED

1. After final affirmance in this Court of an order confirming a reorganization plan for a railroad, is it within the power of a Circuit Court, or a Judge thereof, to enjoin compliance with the mandate of this Court?

2. Even if the circumstances might still be reexamined below after such adjudication in this Court, is it within the power of the Circuit Court to take such action when no consent to such reexamination has been given by this Court, and the District Court, to whose discretion any motion for rehearing is addressed, has in terms found that the motion fails to state such a case as would justify reexamination of the original determinations?

3. Even if the Circuit Court had power to reexamine the judgment in such circumstances, and in that connection to stay all further proceedings until final decision by it, should not this Court forthwith receive and decide the whole case where (*i*) no claim of changes in circumstances is made except claims heretofore urged upon this Court and rejected by it, (*ii*) it is manifest, in the light of the record and those matters of which judicial notice may properly be taken, that such changes in conditions as have occurred since the decision of this Court have all been adverse to the Debtors' contention and (*iii*) to abandon the case to the ordinary appellate program would consume so much time that identical motions and appeals might be again initiated upon its conclusion and thus forever defeat execution of this Court's judgment?

4. Is not certiorari an appropriate appellate procedure by which all these questions may now be decided and final justice done?

SUMMARY OF ARGUMENT

1. When, by decision of this Court, an order confirming a Plan becomes final, it conclusively determines all controversy as to participation under the Plan, including the question of what classes shall participate, and what classes shall not, so that it is not competent for the Debtor to reopen this question and the Circuit Court was thus without power to enjoin compliance with the mandate of this Court.

2. Even if it were competent for the Debtor to reopen the question, that could be done, in the absence of consent by this Court, only by a motion for rehearing, addressed to the discretion of the trial court, and when such a motion is denied by the trial court on the ground that it fails to state such a case as would justify reconsideration of the original determinations, the order of denial is not appealable and the Circuit Court was thus without power to enjoin compliance with the mandate of this Court.

3. Even if the Debtor's motion, or its denial, were reviewable on appeal, there could be no doubt that (*i*) all claims made in the motion have previously been urged upon this Court in this same reorganization and rejected by it in its decisions of June 10, 1946, and October 28, 1946, and (*ii*) there has been no change of conditions since either of those dates except changes adverse to the Debtor's contentions.

4. Certiorari affords a proper means by which this Court may correct departures from its mandate below or stay action beyond the limits of power, and even if the question were one within the power of the Circuit Court to review, this Court will, in the circumstances, hear and determine the case without awaiting final action of the Circuit Court in view of the public interest that the regulatory scheme be made a workable one and the processes of the courts remain a means for reaching a result rather than a perpetual circuit for blocking reorganizations.

STATEMENT

A plan for the reorganization of the Rio Grande was approved by the District Court for Colorado on October 25, 1943, and confirmed by it on November 29, 1944. On appeals by the Debtor and by City Bank Farmers Trust Company, as Trustee under the most junior bonds (the General Mortgage Bonds), those orders were reversed by the Circuit Court below on May 10, 1945, in order that more liberal treatment might be provided for the General Mortgage Bonds, though the Circuit Court approved the finding that the old stock had no value.[1] Judge Phillips sat in this appeal and concurred in result, though his separate opinion may imply that some provision should be made for the old stock.[2]

On petition by holders or representatives of each class of affected senior securities, certiorari was granted on October 8, 1945. The Debtor also petitioned for certiorari and, pending action on the petition, submitted all its contentions, both for the General Mortgage Bonds and for the old stock, in brief and oral argument. By an opinion and order of June 10, 1946, Frankfurter, J., dissenting, this Court reversed the action of the Circuit Court, affirmed the orders of the District Court that approved and confirmed the Plan and remanded to the District Court for further proceedings. At the same time the Debtor's petition for certiorari was denied.

Two orders staying the issuance of the Court's mandate to the District Court were entered on ex parte applications of the Debtor in July and August, but the third application was heard in chambers by Mr. Justice Reed and denied on August 19, 1946. The mandate, dated August 27, 1946, thereupon issued.

The Debtor had filed a Petition for Rehearing on July 2,

[1] See printed Transcript of Record, Nos. 278-282, October Term, 1945, p. 254.

[2] Id. at p. 260.

1946, and a Supplemental Petition for Rehearing on August 15, 1946, renewing its original contentions that reduced interest rates and increased prosperity required the Plan to be set aside, and urging also that all prior applications of Section 77 had been rejected by discussions in the 79th Congress. These petitions, together with other petitions by the Trustee for the General Mortgage Bonds, were denied on October 28, 1946.

The District Court thereupon proceeded at once to consider a motion of the Debtor, previously filed, asking that the orders approving and confirming the Plan be vacated and the cause remanded to the Interstate Commerce Commission because of the same alleged changes of conditions previously urged before this Court. Insurance Group Committee, representing holders of affected senior bonds of various classes, and the senior Indenture Trustees moved the court to deny the Debtor's request summarily, without hearing testimony, on the grounds that (*i*) the controversy was closed by the final judgment of this Court and (*ii*) even if it were competent for the Debtor to reopen the controversy, the Debtor's motion failed to state such a case as would justify reconsideration of the original determinations (R. 10-12). This motion was supported by the Reorganization Committee appointed pursuant to the Plan to carry it out. After full argument, the District Court sustained this position and entered an order denying the Debtor's motion on these exact grounds (R. 14).

Thereupon the Debtor filed a notice of appeal to the Circuit Court below and immediately gave notice of an application for an order by the Circuit Court, or a Judge thereof, staying all further proceedings for the consummation of the Plan. Judge Phillips heard this motion at once, without awaiting the record below. It was resisted by Insurance Group Committee and the Reorganization Committee on each of the grounds asserted in the District Court and on

the further grounds that there was no appealable case and that the Circuit Court had no jurisdiction.

On November 2, 1946, Judge Phillips, having received the record from the District Court, entered the order in question (R. 27-28), staying all further proceedings for the consummation of the Plan until final disposition of the appeal after argument before the Circuit Court at its term beginning January 13, 1947, well after the date planned for the consummation of the reorganization.

ARGUMENT

1.

The Judgment of This Court Closed the Controversy and the Circuit Court had No Power to Enjoin Execution of the Mandate.

However large may be the opportunities under Section 77 for litigation and delay, surely it must have been the Congressional design to provide some determinable time when the controversy closes. That, we believe, was in terms provided by the first two sentences of subsection (f):

> "Upon confirmation by the judge, the provisions of the plan and of the order of confirmation shall, subject to the right of judicial review, be binding upon the debtor, all stockholders thereof . . . and all creditors . . . Upon confirmation of the plan, the debtor . . . shall have full power and authority to, and shall put into effect and carry out the plan . . . under and subject to the supervision and the control of the judge . . ."

There could be no clearer way of saying that, subject only to the right of judicial review, a confirmation order finally determines all questions of participation under the Plan, including the question of what classes shall participate and what classes shall not. The words "subject to the right of

judicial review" give special emphasis to this result, for they show that, while the determination made by a confirmation order may be revised or upset on appeal, there shall not be any other way of reopening it, such as the way attempted by the Debtor in its motion to vacate the confirmation order immediately after its final affirmance by this Court.

There is a further indication of the legislative intent to this effect. Chapter X, providing for industrial reorganizations, contains an express provision that a plan may be modified "before or after its confirmation" (Sec. 222). A similar provision was in subsection (f) of the earlier Section 77 B. The inclusion of a provision for modification after confirmation in the statute for industrial reorganizations, and its omission from the railroad statute, is strong corroboration of the Congressional intent that a finally adjudicated confirmation order closes the controversy. It is of interest, in this connection, to note that the policy for finality of confirmation is so strong that, despite these words in Section 77 B, the Circuit Court of Appeals for the Seventh Circuit held in *In re Diversey Building Corp.*, 141 F. 2d 65, 68 (1944), that:

> "We cannot accept appellant's interpretation of subsection f of this Act. We are convinced that Congress did not intend that a debtor corporation should be permitted to ask for a radical change of plan of reorganization after it had been confirmed by the court and was being executed under the court's supervision . . . We interpret subsection f to mean that changes and modifications after the plan is confirmed refer to such changes as will better aid in carrying out the plan which has been finally confirmed, and not such changes or modifications as will materially alter the property rights established by the decree of confirmation . . ."

A fortiori a decree of confirmation is final under Section 77 where there is no such provision for subsequent modification.[8]

This clear Congressional purpose is in no way undermined by the next sentence of subsection (f) of Section 77 that:

> "The property dealt with by the plan, when transferred and conveyed to the debtor . . . shall be free and clear of all claims of the debtor, its stockholders and creditors, and the debtor shall be discharged from its debts and liabilities. . ."

These words are merely confirmatory of the legal situation created by the final confirmation order. Indeed, there is nothing left to determine with respect to classes, like the old stockholders represented by the Debtor here, who receive nothing under the Plan. The situation, in short, is the familiar one where an adjudication in equity conclusively determines the rights of the parties, though the formal modification of their prior legal rights may, as a matter of technique, be postponed until the actual execution of the decree. For example, an agreement to sell land is specifically enforceable in equity, and a decree of specific performance conclusively determines the rights of the parties, though the old legal title may formally remain in the promissor until a deed is delivered in execution of the decree.

The confirmation order finally affirmed by this Court is, by its terms, a complete and final disposition of the Debtor's case. The words are:

> "(b) The provisions of the Plan and of this Order shall forthwith become and be, and are hereby declared

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[8] Of course, this clear Congressional purpose controls, for the courts sit only to carry out the Act, and it is immaterial for present purposes that, under other statutes, the general rule is that the entire process of reorganization is "open to reexamination out of time by the District Court, in its discretion, and subject to intervening rights." (*Pfister* v. *Northern Illinois Finance Corp.*, 317 U. S. 144, 152, 1942; and see *In re Equitable Office Building Corp.*, C.C.H. Bankr. Serv. ¶55,722 (1946)).

to be, final and binding, upon the Debtor and the Subsidiary Debtor, and all of their respective stockholders . . . and all creditors . . .

"(d) The rights of all stockholders and creditors . . . shall be only those provided by the Plan.

"(e) The Debtor . . . is, authorized and directed, and shall have full power and authority, to take all steps, and to do all things, necessary . . . to put into effect and carry out the Plan and the orders of this Court relative thereto . . .

"(i) This order shall become, and it is hereby declared to be, effective immediately upon its entry . . ." (Printed Transcript, Nos. 278-282, October Term 1945, pp. 230-2).

In summary, Section 77 contemplates that a confirmation order shall be in final form and, when put in that form, shall finally determine all questions of participation under the Plan. The confirmation order entered in this case on November 29, 1944, was in final form. Its final affirmance by the orders of this Court entered June 10, 1946, and October 28, 1946, completed the adjudication of the controversy. To permit the controversy to begin all over again at this time deprives the statutory scheme of all possibility of result and deprives the mandate of this Court of all dispositive effect. The Debtor should be no more entitled here than elsewhere in the law to appeal from an execution of a final judgment. If so, the Congressional scheme for a workable and expeditious method to reorganize interstate carriers is paralyzed for all practical purposes.

The holding of the District Court to this effect was, therefore, right, and the Circuit Court was without power to reconsider the issues on appeal or to issue its injunctive order staying execution.

2.

Even If It were Competent for the Debtor to Reopen the Merits, the District Court's Denial of That Motion Here Was Not Appealable.

It is settled law, in bankruptcy proceedings as elsewhere, that:

> "An appeal does not lie from the denial of a petition for rehearing." (*Pfister* v. *Northern Illinois Finance Corp.*, 317 U. S. 144, 149-150, 1942.)

It is uniformly recognized that this rule applies under Section 77, and that motions to vacate or modify orders, as the Debtor's motion here in terms is, are motions for rehearing within the meaning of this rule. *Old Colony Trust Co.* v. *Kurn*, 138 F. 2d 394, 395 (C.C.A. 8, 1943); *In re Chicago, Milwaukee, St. Paul & Pacific R.*, 155 F. 2d 489, 492 (C.C.A. 7, 1946), *cert. den.*, ... U. S. ...., 15 L. W. 3147 (October 14, 1946). So if there be any interest in going beyond point 1 above, that Judge Phillips' order is in conflict with the mandate of this Court in this proceeding, it is also true that Judge Phillips' order is in conflict with prior decisions of this Court and in conflict with decisions of other circuit courts of appeals.

Judge Symes, to whose views this Court has given "especial weight" in view of his extensive "familiarity with the reorganization" (90 L. ed. at 1154), heard full argument on the Debtor's motion. By his order (R. 16) he correctly characterized it as a petition for a rehearing and then, in the exercise of his discretion to which alone it was addressed, denied it on the ground, among others, that:

> ". . . the Petition for Rehearing fails to state a case which justifies reconsideration by this Court of the issues already determined;"

Under settled law, the denial of the motion on this ground was not appealable, and that objection was duly made in the record that was before the Circuit Court as well as in oral argument (R. 11, 34). There was, accordingly, no power in the Circuit Court to hear the case or to enter its order staying all further proceedings in the District Court in execution of this Court's mandate.

This result is required not only by the uniform tenor of authority, but also by the policies of Section 77, which make the District Court a part of the composite tribunal, closely "brigaded" with the Commission (*Palmer* v. *Massachusetts*, 308 U. S. 79, 87, 1939), to weigh and determine matters of fact, and attribute, as we have seen, finality to its confirmation order subject only to "the right of judicial review." The field so covered by statute is not one in which there may be imported alien concepts of the old common law for reexamination of the issues in an independent proceeding called a bill of review. But even if a bill of review were permissible under Section 77, it is surely a sound principle that the bill will not lie, after an appeal, except upon consent of the highest appellate court that has decided the case, for the power should reside somewhere to put an end to the Debtor's program of perpetual motion through the courts. This Court has so held. Speaking of a bill of review in a trial court to impeach a judgment that had been acted on by an appellate court, it held:

> "Such a judgment, it was said, was not subject to impeachment in such a proceeding because a trial court lacks the power to deviate from the mandate of an appellate court. The solution evolved by the courts is a procedure whereby permission to file the bill is sought in the appellate court. . . The petition must contain the necessary averments, supported by affidavits or other acceptable evidence; and the appellate court may in the exercise of a proper discretion reject the petition, in

which case a bill of review cannot be filed in the lower court." (*Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U. S. 238, 248, 1944).

This is accepted as standard practice:

> "Since a bill of review can only be entertained by the court which rendered the decree or judgment sought to be vacated, and it is powerless to entertain and act upon such a bill while an appeal is pending, leave so to do and a remand of the cause must be obtained from the appellate court if the particular remedy is to be resorted to at that stage of proceedings. The approved practice appears to be to apply to the trial court for leave to file a bill of review and to ask that, if it grants such leave, it request a remand of the cause and record from the appellate court. It is also held that, after an appeal has been determined and decree entered according to the mandate, leave should be obtained from the appellate court before seeking the setting aside of the judgment by bill of review in the lower court. In other words, the bill itself is directed to the lower court, but it can only be entertained and determined by that court with the consent of the higher one, after the latter has reviewed the record; and this is true even when the ground of the bill is newly discovered evidence. . . ." (*Cyclopedia of Federal Procedure*, Vol. 8, Sec. 3603, pp. 352-3, 2d Ed. 1943)

The rule is well known to the Circuit Court below, which had previously held in another case:

> "But when a judgment has been affirmed on appeal and the mandate spread of record, a bill of review based on newly discovered evidence will not lie without leave of the appellate court to file; and therefore if the case be treated as a bill of review it was properly dismissed for

want of such leave." (*Brady* v. *Beams*, 132 F. 2d 985, 986, C.C.A. 10, 1942).

But nothing in the Debtor's motion invokes any principle of a bill of review, nor did its counsel so characterize it any stage below. No consent of this Court was obtained for its filing. It can not, therefore, be properly considered as such a bill, but may be treated only as a motion for rehearing, which the trial court did. In either alternative, there was no case before the Circuit Court and it had no power to overrule the mandate of this Court by enjoining all action in accordance with it for the consummation of the Plan.

3.

The Debtor's Motion States No Case Meriting Further Consideration, but Is Merely Repetitive and Frivolous.

If either point 1 or point 2 above is well taken, it is unnecessary for the Court to consider the Debtor's motion or what it says. But even if neither of those points were well taken, it is manifest that the Debtor's motion is purely repetitive of issues determined by this Court and made for the sole purpose of delay. In such circumstances, in a reorganization of these dimensions where the public interest is involved in a speedy conclusion of the proceedings, in the unification of the two railroad systems to be accomplished thereby and in the consummation of the Plan at or near the end of the calendar year, this Court may appropriately consider and determine the whole matter without awaiting final action by the Circuit Court.

In this point 3 we examine the Debtor's motion to show that in fact it is merely repetitive of contentions heretofore submitted by it to this Court and rejected.

The main premise of the Debtor's motion is an alleged

change of economic conditions affecting reorganization values. This is stated in Sections 2 and 3 and particularized in Section 4.[4]

The only concrete specifications are three, which we may briefly notice as follows:

(*a*) the decline in interest rates;

(*b*) the Geneva Steel Plant; and

(*c*) what is called "a permanent elevation of the national income."

This argument of interest rates was, as the Court will recall, one of the main bases on which the Debtor asked the Court to reverse the confirmation of the Plan. In its original brief of February 15, 1946, the Debtor urged that interest rates had declined from a level of 4 per cent to a level of 3 per cent, so that, even if reorganization values were to be determined by earnings, a complete revaluation was required by this event (pp. 32-33). In support of this assertion the Debtor asked the Court to take judicial notice of all recent railway financing, and set out in its brief a table of 20 issues (pp. 33-34).

The Court in terms rejected that contention:

[4]There is no need to note Section 1, dealing only with the question of whom the Debtor represents. The course of this case makes it abundantly clear that City Bank Farmers Trust Company, Trustee, which did not join in the motion, represents the General Mortgage Bonds, and the Debtor speaks only for the holders of the old stock. Nor do we now need to notice the claim in Section 5 that all prior applications of Section 77 have now been invalidated by discussions in the 79th Congress in connection with the unsuccessful effort to amend Section 77 by S. 1253. Quite apart from the fact that S. 1253 did not repudiate the rationale of Section 77 as proclaimed by this Court, but on the contrary left it operative as to the Rio Grande and a number of smaller carriers, and proposed only to promulgate a new system for other roads, the issue has now been concluded by the Court's order of October 28 denying the Debtor's Supplemental Petition for Rehearing in which that contention was submitted at length.

"We note also the contention that the possibility of a national income much higher and interest rates much lower than before World War II should affect valuation based on prospective earnings. Those factors, we think, were before the Commission when it made its earnings estimate." (90 L. ed. at 1145)

* * * * *

"Nothing that respondents have called to our attention indicates any improvement in economic conditions or prospects in July, 1944, or any date since, over June, 1943, the date of the Commission's approval of the plan, which would justify a treatment different from that accorded the claimants in 1943." (90 L. ed. at 1154).

As if this were not enough, the Debtor renewed the same contention in its Petition for Rehearing filed July 2, 1946. Indeed, a decline of 1½% was then asserted, as against the 1% in February.[5] The Court's rejection of that petition on October 28 is a final rejection of the argument.

Nor is there any possibility of any argument that interest rates, reflecting composite judgments on the cost of money and the future of the rails, have declined since this Court acted on June 10. The Court may judicially notice standard market quotations, as it did in its original decision (90 L. ed. at 1147). When the opinion of this Court was handed down on June 10, the Dow-Jones average of 10 first grade rail bonds was 117.25. On October 30, it was 109.76. This deterioration is, of course, all the more acute in the second grade rails, where the average declined from 100.61 to 89.09. The Rio Grande is by no means better than these general averages. When-issued market quotations for the new securities under the Plan showed on June 10 a bid for

[5]Petition for Rehearing, p. 7; Supplemental Petition for Rehearing dated August 15, 1946, pp. 3-4.

the new First's of 101 and for the new Income's 79. On November 1 the corresponding figures were 90 and 59. Manifestly the Debtor's motion wholly fails to state any case justifying reconsideration.[6]

The argument about the Geneva Steel Plant is also one repeatedly pressed on the courts before. Judge Phillips took judicial notice, in his concurring opinion on the merits in the original appeal, of the probable continuation of the Geneva Steel Plant through the peace-time future.[7] The Debtor, in its main brief of February 15, 1946, before this Court, urged that the Geneva Steel Plant

> "... is certain to be revolutionary in its contribution to the new earning power of the Debtor's properties (p. 38; see also pp. 25 and 39).

All this was considered by this Court, together with evidence of record contemplating that the Geneva Steel plant would continue operation after the war in such manner as to make a substantial contribution to the earnings of the road.[8] The decision of this Court that the Plan should be confirmed and carried out in spite of this objection leaves no opportunity for the same issue to be relitigated now.

The last, and perhaps most fundamental, contention in the Debtor's motion is that greater prosperity awaits the future of the Rio Grande than could have been anticipated. This, of course, was likewise its basic argument against the Plan before this Court. Its main brief of February 15, 1946 argued that:

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[6] All of these quotations are from issues of "The Commercial & Financial Chronicle" dated June 10, 1946, June 17, 1946, and November 4, 1946.

[7] Printed Transcript, Nos. 278-282, Oct. Term 1945, p. 261.

[8] Printed Transcript, Nos. 278-282, Oct. Term 1945, pp. 995-6 and 1016.

> "There are other new factors which permanently elevate earning power to a level far above that which could possibly have been estimated." (p. 33),

and that the whole national income would surely be greater for the long term future. But, by words already quoted above, this Court rejected that argument, pointing out first that these factors "were before the Commission when it made its earnings estimate" (90 L. ed. at 1145) and then holding that:

> "Nothing that respondents have called to our attention indicates any improvement in economic conditions or prospects in July, 1944, or any date since, over June, 1943, the date of the Commission's approval of the plan, which would justify a treatment different from that accorded the claimants in 1943." (90 L. ed. at 1154)

This Court then took judicial notice of the petition filed by the railroads before the Interstate Commerce Commission on April 15, 1946, for increased freight rates, and quoted from the petition as to the "critical" situation of the railroads in view of the great increases in wages and costs of materials and supplies and the great reduction of traffic and revenue from the war time peak. The Court then said:

> "The Denver apparently did not vary greatly from this over-all picture." (90 L. ed. at 1149n.),

and added:

> "Even before the transportation difficulties of 1946, it was obvious that the Commission's judgment was being confirmed by events." (90 L. ed. at 1148-9).

There can be no serious suggestion that there has been any improvement in economic conditions or prospects since the decision of this Court on June 10, or since the earnings period considered in the Court's opinion. In support of its conclusion, the Court took judicial notice of the operating reports of the Rio Grande for January and February of 1946 and pointed out that operating revenues for that period were 18% below the corresponding period of 1945 (90 L. ed. at 1149n.). Operating revenues of the Rio Grande through August of 1946, which were in the record before the District Court, show a decrease of 37% under the corresponding period of 1945, or twice the percentage decline at the time of this Court's opinion. At the same time the operating ratio was 86% as compared with 61% in the first eight months of 1945 and 69% for the first eight months of 1944, immediately preceding the confirmation order. No one can pretend that since June 10 there has been any decrease in cost levels, which are an even more fundamental cause of the present critical railroad situation. On the contrary, it is known everywhere, and the Court may judicially notice, that the trend of costs has been sharply upward. The large wage increases of January 1, 1946, the addition to them by the Crosser Bill of July 31, 1946, raising pay roll tax deductions, and the sharp increases during this year in the various standard indices of consumers' prices and wholesale prices are familiar to all. Not only is there no basis for any argument that there has been any improvement in conditions, whether generally or of this particular property, since the opinion of the Court on June 10, but the whole trend has been adverse to the Debtor's contentions.

It is traditional with courts of equity to accommodate their judgments to the situation existing at the time of de-

cree and to do justice as of that time.* As indicated above, this Court unmistakably endeavored, and successfully so, to do just that in its opinion of June 10. It is obviously frivolous to urge that since that time there has been any change of conditions favorable to the Debtor's argument. It is not in the public interest, for it can not increase respect for the judicial process, to permit the spectacle of a Plan, given finality by a judgment of this Court on Monday, to be enjoined by a Circuit Judge on Saturday. If it was competent for the Debtor to raise these questions again, this Court should take them now and decide them at once.

4.

Certiorari is a Proper Means of Remedy.

This Court has authority to bring a case before it for decision by a writ of certiorari granted "either before or after a judgment or decree" of the Circuit Court (Judicial Code, Section 240(a); 28 U. S. C., § 347(a)). Such procedure is provided for by Rule 39, which, in addition, states that reasons as in petitions after final judgment will be applied in granting or refusing the petition, adding:

> "That the public interest will be promoted by prompt settlement in this court of the questions involved may constitute a sufficient reason."

Nothing in the Bankruptcy Act restricts this plenary authority (Bankruptcy Act, Sec. 24, 11 U. S. C., § 47).

So certiorari is a means by which this Court may exercise

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*Randel v. Brown, 2 How. 406 (1844); Stonega Coke & Coal Co. v. Price, 106 F. 2d 411 (C. C. A. 4, 1939), cert. den., 308 U. S. 618 (1939), 116 F. 2d 618 (C. C. A. 4, 1940). See Tennessee v. Condon, 189 U. S. 64, 71 (1903).

its full authority. Specifically, it is apt procedure for ending a departure in the courts below from a previous mandate of this Court. The Court has said:

> "As respects the Federal courts, it is well settled that where the mandate leaves nothing to the judgment or discretion of the court below, and that court mistakes or misconstrues the decree or judgment of this court and does not give full effect to the mandate, its action may be controlled, either upon a new appeal or writ of error if involving a sufficient amount, or by writ of mandamus to execute the mandate of this court." (*In re Blake and Others*, 175 U. S. 114, 117, 1899).

See also *American Construction Co. v. Jacksonville, Tampa and Key West R.*, 148 U. S. 372, 382 (1893).

While, of course, this Court usually acts only after final judgment in the Circuit Court, that is in order to permit the Circuit Court to pass on the controversy, in the expectation that its decision may well prove final and may in any event be informative to this Court. But whenever the Court deems it appropriate so to do, certiorari issues to review interim action, like an interlocutory injunction, which is analogous here. *E. I. duPont de Nemours Powder Co.* v. *Masland*, 244 U. S. 100 (1917); *City of Denver* v. *New York Trust Company*, 229 U. S. 123 (1913); *American Construction Co.* v. *Jacksonville, Tampa and Key West R.*, 148 U.S. 372 (1893).

In this case it is neither desirable nor informative to await the final judgment of the Circuit Court. The only issues have

been finally adjudicated by this Court, and it is in the public interest that this Court should speedily declare the result.

At the moment, the District Court has before it not only the mandate of this Court commanding

> "that such execution and further proceedings be had in said cause, as according to right and justice and the laws of the United States [as applied in the opinion] ought to be had . . ."

but also an order of Judge Phillips ordering that

> "all proceedings to consummate the Plan . . . be and they hereby are stayed, and that no further action be taken under or pursuant to the order . . . confirming said Plan . . ."

The order of this Court, we submit, was final and could not be reopened. But, in the alternative, if it was not, then the order of the District Court denying the Debtor's motion was final, and may not be reviewed on appeal. And, finally, if debtors are to be permitted the extraordinary privilege of an appeal from execution of a final judgment already affirmed in this Court, surely it is in the public interest that this Court put an early end to the new appeal. If the slow pattern of initial review be followed again, such an interval will occur between the order of the District Court and the last order on the current set of appeals that a new appeal from that order will then lie as much as this one does. This means litigation without limit.

The situation of the Rio Grande, where all proper appellate review has now been had and the creditors are entitled to consummate the Plan, while bringing together these

two important railway systems and doing so at or near the close of the calendar year, is itself a sufficient reason for summary action by this Court. But the consequences to the public regard for law and order that may follow upon any other course are far more serious.

PRAYER AND MOTION

We respectfully ask that this Court may forthwith:

(*a*) consent (in view of the printed record that accompanies the petition) that the record so printed may be received in lieu of reprinting under the supervision of the Clerk, or, in the alternative, waive a printed record;

(*b*) abbreviate the time within which respondents may answer or reply;

(*c*) grant a writ of certiorari to review Judge Phillips' order of November 2, 1946, in such manner as to give this Court authority to dispose of the whole matter;

(*d*) summarily vacate and supersede such order;

(*e*) at the time of granting the writ of certiorari, without awaiting briefs or oral argument in usual course, enter final judgment dismissing the appeal from the District Court's order of October 30, 1946, or, in the alternative, summarily affirming that order;

(*f*) direct the immediate issuance of the mandate of this Court; and

(*g*) grant all such other relief as may be proper.

These requests are without prejudice to the motion for writs of mandamus and prohibition if the Court should feel that the relief sought should be granted through that means.

Dated November 9, 1946.

Respectfully submitted,

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APPENDIX

Section 77(f) of the Bankruptcy Act, as Amended.

"Upon confirmation by the judge, the provisions of the plan and of the order of confirmation shall, subject to the right of judicial review, be binding upon the debtor, all stockholders thereof, including those who have not, as well as those who have, accepted it, and all creditors secured or unsecured, whether or not adversely affected by the plan, and whether or not their claims shall have been filed, and, if filed, whether or not approved, including creditors who have not, as well as those who have, accepted it. Upon confirmation of the plan, the debtor and any other corporation or corporations organized or to be organized for the purpose of carrying out the plan, shall have full power and authority to, and shall put into effect and carry out the plan and the orders of the judge relative thereto, under and subject to the supervision and the control of the judge, the laws of any State or the decision or order of any State authority to the contrary notwithstanding. The property dealt with by the plan, when transferred and conveyed to the debtor or to the other corporation or corporations provided for by the plan, or when retained by the debtor pursuant to the plan, shall be free and clear of all claims of the debtor, its stockholders and creditors, and the debtor shall be discharged from its debts and liabilities, except such as may consistently with the provisions of the plan be reserved in the order confirming the plan or directing such transfer and conveyance or retention, and the judge may require the trustee or trustees appointed hereunder, the debtor, any mortgagee, the trustee of any obligation of the debtor, and all other proper and necessary parties, to make any such transfer or conveyance, and may require the debtor to join in any such transfer or conveyance made by the trustee or trustees. Upon the termination

of the proceedings a final decree shall be entered discharging the trustee or trustees, and making such provisions as may be equitable, by way of injunction or otherwise, and closing the case. Upon confirmation of a plan the Commission shall, without further proceedings, grant authority for the issue of any securities, assumption of obligations, transfer of any property, sale, consolidation or merger of the debtor's property, or pooling of traffic, to the extent contemplated by the plan and not inconsistent with the provisions and purposes of the Interstate Commerce Act as now or hereafter amended. The provisions of Title I and of section 5 of the Securities Act of 1933, as amended, shall not apply to the issuance, sale, or exchange of any of the following securities, which securities and transactions therein shall, for the purposes of said Securities Act, be treated as if they were specifically mentioned in sections 3 and 4 of said Securities Act, respectively: (1) All securities issued pursuant to any plan of reorganization confirmed by the judge in accordance with the provisions of this section; (2) all securities issued pursuant to such plan for the purpose of raising money for working capital and other purposes of such plan; (3) all securities issued by the debtor or by the trustee or trustees pursuant to subsection (c), clause (3) of this section; (4) all certificates of deposit representing securities of, or claims against, the debtor, with the exception of such certificates of deposit as are issued by committees not subject to subsection (p) of this section. The provisions of subdivision (a) of section (14) of the Securities Exchange Act of 1934 shall not be applicable with respect to any action or matter which is within the provisions of subsection (p) hereof."

FILE COPY

No. 690

JOINT BRIEF FOR PETITIONERS

Office - Supreme Court, U. S.
JAN 3 1947

IN THE

Supreme Court of the United States

October Term, 1946

INSURANCE GROUP COMMITTEE, REORGANIZATION COMMITTEE, GUARANTY TRUST COMPANY OF NEW YORK, TRUSTEE, CENTRAL HANOVER BANK AND TRUST COMPANY, TRUSTEE, UNITED STATES TRUST COMPANY OF NEW YORK, TRUSTEE, and THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, TRUSTEE,

Petitioners,

vs.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, ET AL.,

Respondents.

ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

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GEORGE D. GIBSON
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December 31, 1946.

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*References too numerous for effective citation.

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OPINIONS BELOW

No written opinion was delivered below, either in the District Court or in the Circuit Court.

The District Court order, containing an opinion (R. 14[1]), and its oral opinion upon entering the order (R. 77-83) are not reported.

The stay order entered in the Circuit Court (R. 27-28) is not reported.

JURISDICTION

The stay order of the Circuit Court was entered on November 2, 1946. The order of the District Court was entered on October 30, 1946. The Petition for a writ of certiorari was filed on November 12, 1946, and was granted on December 16, 1946.

The jurisdiction of this Court rests on Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C., §347(a)).

STATUTE INVOLVED

The issues involve Section 77(f) of the Bankruptcy Act (11 U. S. C., §205(f)), quoted in its entirety in the Appendix.

QUESTIONS PRESENTED

1. Is a judgment of this Court affirming the approval and confirmation of a railroad reorganization plan against an attack based on alleged changes of condition conclusive against a renewal of the same attack in the courts below based on the same alleged changes of condition?

2. Is it the intention of Section 77 that a reorganization

[1]References in this form are to the printed Transcript of Record in this case.

plan becomes final when its approval and confirmation are affirmed by this Court?

3. Is a petition for rehearing addressed to the discretion of the District Court so that its denial is not appealable?

In this brief we submit that each of these questions should be answered in the affirmative.

STATEMENT

1. The Original Decision of this Court.

This case is a sequel to *Reconstruction Finance Corporation, et al.* v. *The Denver and Rio Grande Western Railroad Company, et al.*, — U. S. —, 90 L. ed. 1134 (June 10, 1946, referred to herein as the Rio Grande Appeal). The issue here is whether this Court's decision in that case is to be carried out.

The litigation concerns a plan for the reorganization of The Denver and Rio Grande Western Railroad Company. The Plan was approved by the Interstate Commerce Commission on June 14, 1943.[2] In the Plan the Commission approved a new capitalization slightly larger, in aggregate face amount, than the total claims of underlying creditors, thus leaving a small amount of the new common stock for the old junior system bonds, known as the General Mortgage Bonds.[3] There was nothing left for unsecured creditors or stockholders. A controversy thus arose between the underlying creditors, on the one hand, who sought consummation of the Plan, and, on the other hand, the holders of the General Mortgage Bonds and the old stock, who sought modification of the Plan so as to provide additional securities for

[2] Transcript of Record in October Term, 1945, Nos. 278-282 (cited as Tr.) at p. 1.

[3] About 10% of all the new common stock to be initially issued, and equal to about 10% of the total claim of the General Mortgage Bonds.

them. The old corporation (herein called the Debtor) purported to speak for the General Mortgage Bonds as well as for the stock, though the former were actively represented by the Indenture Trustee.

The Plan was approved by the District Court for Colorado on October 25, 1943. From that approval, the Debtor appealed to the Circuit Court below. After submission of the Plan for acceptance or rejection by creditors, it was confirmed by the District Court on November 29, 1944. From that confirmation, both the Debtor and the Indenture Trustee for the General Mortgage Bonds appealed to the Circuit Court. On May 10, 1945, the Circuit Court reversed the orders approving and confirming the Plan, in order that more liberal treatment might be provided for the General Mortgage Bonds, though the Circuit Court approved the finding that the old stock had no value (Tr. 254). Judge Phillips concurred in result, though his separate opinion may imply that some provision should also be made for the old stock (Tr. 260).

On petition by the underlying creditors, certiorari was granted on October 8, 1945. The Debtor also petitioned for certiorari and, pending disposition of its petition, submitted all its contentions, both for the General Mortgage Bonds and for the old stock, by brief and oral argument. As shown in detail in the Argument below, these contentions included (*a*) a contention that the Plan should be denied effect because of a decline in interest rates, (*b*) a contention that the Plan should be denied effect because of the Geneva Steel Plant, and (*c*) a contention that the Plan should be denied effect because of an enhanced volume of business.

Rejecting all these contentions by an opinion covering the whole controversy, this Court on June 10, 1946, Frankfurter, J., dissenting, reversed the action of the Circuit Court, affirmed the orders of the District Court approving and confirming the Plan and remanded to the District Court for

further proceedings. At the same time the Debtor's petition for certiorari was denied.

The Debtor then filed in this Court a Petition for Rehearing on July 2, 1946, and a Supplemental Petition for Rehearing on August 15, 1946, repeating its original contention that reduced interest rates required that the Plan be denied effect, and further urging that all prior interpretations of Section 77 had been superseded by the discussions incident to the unsuccessful effort in the 79th Congress to amend the Act. These petitions, together with other petitions for rehearing filed by the General Mortgage Trustee, were denied on October 28, 1946. In the meantime, the mandate of this Court issued on August 27, upon denial of a third application by the Debtor for a stay.

2. Subsequent Proceedings Below.

Without awaiting this Court's action on the petitions for rehearing, the Debtor filed in the District Court on September 17 a petition (herein called the Petition) for an order (*a*) vacating the orders that approved and confirmed the Plan and (*b*) referring the case back to the Commission for formulation of a new plan (R. 1). The Petition, though based on alleged changes of condition, makes no allegation of any change (apart from the Congressional discussions referred to above) except the three contentions already submitted to this Court as shown above, namely, the contentions of (*a*) reduced interest rates, (*b*) Geneva Steel Plant operation and (*c*) enhanced volume of business. Insurance Group Committee, representing holders of underlying bonds, and the Indenture Trustees of underlying liens moved the District Court to deny the Petition, without hearing testimony, on the grounds that (*i*) the controversy had been closed by the final judgment of this Court and (*ii*) even if it were

competent for the Debtor to reopen the controversy, the Petition failed to state such a case as would justify reconsideration of the original determinations (R. 10-12). This motion was supported by the Reorganization Committee appointed pursuant to the Plan to carry it out.

Promptly after this Court's denial of the petitions for rehearing on October 28, the District Court took up these issues, on full argument of counsel. At the conclusion of the hearing, the District Court delivered an oral opinion (R. 77-83) to the effect that the Petition was without equity or merit, and entered an order (R. 14) denying the Petition on the express grounds that the controversy had been closed and that the Petition failed to state a case justifying reconsideration of the issues already determined.

Thereupon the Debtor filed a notice of appeal from this order to the Circuit Court (R. 17-18) and a motion for a stay of all action to carry out the Plan until final disposition of such appeal (R. 15-16). The motion was denied (R. 16).

3. How the Case Comes Up.

Immediately upon the entry of these two orders by the District Court, denying the Petition and denying a stay, the Debtor applied to the Circuit Court for a similar stay (R. 22-26). Judge Phillips heard this motion immediately. It was opposed by Insurance Group Committee and the Reorganization Committee on each of the grounds asserted in the District Court and on the further ground that there was no appealable case and the Circuit Court had no jurisdiction.

On November 2, 1946, Judge Phillips entered an order (R. 27-28) staying all action to consummate the Plan until final disposition of the appeal. The undersigned at once sought certiorari before judgment. It was granted on December 16, 1946.

SUMMARY OF ARGUMENT AND SPECIFICATION OF ERRORS

1. The judgment of this Court affirming on June 10, 1946, the approval and confirmation of the Plan and the denial by this Court on October 28, 1946, of all petitions for rehearing conclusively determined all issues sought to be raised again in the Petition, and the order of the District Court denying the Petition should therefore be affirmed or the appeal therefrom dismissed.

2. Independently of point 1 above, it is the intention of Section 77 that a reorganization plan becomes final when the orders approving and confirming it are finally affirmed on appeal.

3. Independently of points 1 and 2 above, the Petition, if permissible at all, was a petition for rehearing addressed to the discretion of the District Court and its denial, after appraisal of the factual situation, on the ground that it "fails to state a case which justifies reconsideration by this Court of the issues already determined" (R. 14) is not appealable and was plainly right.

The Circuit Court erred by acting, through its stay order, contrary to each of the above points.

ARGUMENT

1. The Judgment of this Court Closed the Controversy.

We do not in this point raise any question of statutory construction or any question as to the effect that might be given to changes of condition supervening after a judgment of this Court affirming the approval and confirmation of a plan under Section 77. We rely, for this point, only on the premise that a judgment of this Court is not open to attack in the lower courts on the same grounds already urged here,

but conclusively determines the issues of the case that it purports to determine.

For that purpose we look, of course, to the issues that were presented for decision by this Court in the Rio Grande Appeal. The fundamental issue was whether the Plan is fair and equitable, or whether a larger capitalization must be permitted in order to make greater provision for the General Mortgage Bonds and some provision for unsecured creditors and the holders of the old stock. In opposing the Plan, the Debtor was entitled to make, and did in fact make, each of the contentions now repeated in the Petition, and each of them was rejected by the opinion of this Court. This will be clear from an analysis of the Petition in which each of its contentions will be matched against the arguments originally made in this Court and the ruling of the Court thereon.

No matter of fact is alleged in Section 1 of the Petition, which merely describes the interests for which the Debtor purportedly acts, or in Section 2, which is a mere argumentative appeal for "justice." Section 3 deals only with the discussions relating to S. 1253 in the 79th Congress, and its veto, and again asserts that they repudiate all prior interpretations of the Act. But that likewise, we think, raises no question. Quite apart from the obvious reply that S. 1253 has been vetoed and thus has no effect, and also that by its own terms the bill did not purport to repudiate the rationale of Section 77 as proclaimed by this Court, but on the contrary had the express purpose of continuing it for the Rio Grande and a number of smaller carriers and proposed only to institute a new system for other roads, the issue has been disposed of by this Court. In its opinion in the Rio Grande Appeal the Court pointed out that criticisms had been voiced and changes had been suggested, but no different legislation had been enacted. "This situation," the Court concluded,

> "leaves clear the duty of the agencies of the Government entrusted with the handling of reorganizations under Section 77, including this Court, to administer its provisions according to their best understanding of the purposes of Congress as expressed in the words of Section 77 read in the light of the contemporaneous [with its enactment] discussion in Congress." (90 L. ed. at 1143)

After the veto of S. 1253, the same contention was renewed in this Court by the Debtor's Supplemental Petition for Rehearing filed August 15, 1946. That petition was denied on October 28, 1946.

The main basis of the Petition is an alleged change of economic conditions affecting reorganization value. This is shown in Section 3 and developed in Section 4. Though making an opulent gesture to "all changes in the National economy, in the railway industry and in the earning power of the Debtor's properties" (R. 3), the Petition offers no concrete specification except those same three contentions already presented to this Court as summarized above. We review them in order.

(*A*) Decline in Money Rates (R. 4-7)

The Petition asserts that since confirmation of the Plan "interest and dividend rates" have declined by 1½% (R. 6) and support for this assertion is attempted by a table of 14 rail issues sold in the year ended November 1, 1945 (R. 6).

This table is but a selection from a longer list of similar nature set out, by resort to judicial notice, in the Debtor's Main Brief of February 15, 1946, in the Rio Grande Appeal (pp. 33-34). It was pertinent there because one of the Debtor's main attacks on the Plan at that time was this same decline in money rates. Thus it urged upon this Court (*id.*, p. 32) that the Plan had:

". . . become unfair and inequitable by reason of recent economic changes which are revolutionary.

"One of these changes is the radical lowering for the indefinite future of money rates."

From this the Debtor argued that, even if reorganization values were to be determined by earnings, a complete revaluation was required by this fact alone (pp. 32-33).

This Court in terms rejected that contention:

"We note also the contention that the possibility of a national income much higher and interest rates much lower than before World War II should affect valuation based on prospective earnings. Those factors, we think, were before the Commission when it made its earnings estimate." (90 L. ed. at 1145)

As if this were not enough, the Debtor renewed the same contention in its Petition for Rehearing of July 2, 1946, and in its Supplemental Petition for Rehearing of August 15, 1946. In the first of these petitions the Debtor said:

"The Respondents in their oral argument and on brief have urged as an independent ground for setting aside the Commission's Plan as well as a full justification for the rejection of the Plan by the General Mortgage Bondholders that very radical and permanent changes in money rates had rendered the Plan obsolete, unfair and unjust . . .

". . . These rates [in the plan] are at least 1½% above what can be justified in view of rates now being paid. . . This situation could not have been known or anticipated by the Interstate Commerce Commission and is an entirely new factor arising after the Plan had been found to be fair and equitable by the Commission . . ." (pp. 6-7)

In the second of these petitions the Debtor relied on a "radical change in the rates for the hire of money" as an

". . . economic change of such character as not only to justify but to require the judicial tribunal, whether the District Court, the Circuit Court of Appeals or the Supreme Court, when the economic change is brought to its attention to give pre-emptory [*sic*] relief by remanding the proceeding to the Commission." (p. 4)

Both petitions were denied on October 28, 1946.

(B) Geneva Steel Plant Operations.

The Petition asserts that the Geneva Steel Plant, located at Provo, Utah, on the lines of the Rio Grande and the Union Pacific, was built after the close of the Commission record, will be operated permanently and "destroys and renders worthless" the Commission's determination of future earning capacity (R. 8).

So far as this assertion deals with the record, it overlooks the testimony of one of the Debtor Trustees showing the construction and size of the Geneva Steel Plant (Tr. 995-6) and evidently contemplating that it would continue operation after the war in such manner as to make a substantial contribution to the earnings of the road (Tr. 1016).

But more importantly, the whole contention as to the Geneva Steel Plant was, like the argument of interest rates, one of the main bases for the Debtor's attack on the Plan before this Court. Judge Phillips, in his original opinion concurring in the Circuit Court's disapproval of the Plan, had taken judicial notice that the Geneva Steel Plant probably would continue in operation (Tr. 261) and his observations were quoted at length in the Debtor's Main Brief of February 15, 1946, in the Rio Grande Appeal (p. 37). In epitomizing this contention, the Debtor said (*id.*, p. 38):

"The development and construction of the great steel plant at Geneva is alone a reason for a complete revaluation of the Debtor's properties and the formulation of a new Plan. The establishment of this industry on the

Debtor's rails is certain to be revolutionary in its contribution to the new earning power of the Debtor's properties."

But this Court rejected all the contentions of the Debtor as to changed conditions, saying:

"Nothing that respondents have called to our attention indicates any improvement in economic conditions or prospects in July, 1944, or any date since, over June, 1943, the date of the Commission's approval of the plan, which would justify a treatment different from that accorded the claimants in 1943." (90 L. ed. at 1154)

(*C*) Post-War National Income.

The Petition alleges a volume of business and an amount of national income "far in excess of any pre-depression income." (R. 9)

This, the fundamental premise of the Petition, was likewise the fundamental premise of the Debtor's case against the Plan in this Court. As it said to this Court in the Rio Grande Appeal (Main Brief of February 15, 1946, at pp. 33-34):

"In most of the pending cases (and this is conspicuously true in the case of the Debtor) there are other new factors [other than reduction in interest rates] which permanently elevate earning power to a level far above that which could possibly have been estimated or predicated upon historical or current earnings.

"Foremost among these factors . . . . is the permanent elevation of National income. . . . Economists will also testify . . . . that the industrial activity and expansion necessary to achieve such a National income would involve demands upon all forms of transportation even in excess of those created by the exigency of the War. This factor alone should preclude the use of his-

torical or pre-war earnings to write down a Debtor's property investment as protected by the law of the land."

This Court rejected that contention, in words already quoted, pointing out that these factors "were before the Commission when it made its earnings estimate" and that nothing in the Debtor's arguments "would justify a treatment different from that accorded" in the Plan, and adding, specifically on this point:

> "Even before the transportation difficulties of 1946, it was obvious that the Commission's judgment was being confirmed by events." (90 L. ed. at 1148-49)

So the Petition presents nothing new.

It is settled law that a judgment, as between the same parties on the same issue:

> ". . . is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose . . . Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever."[4]

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[4] *Cromwell* v. *County of Sac*, 94 U. S. 351, 352-3 (1876). The rule is stated in similar terms in *Bates* v. *Bodie*, 245 U. S. 520, 526-7 (1918), *Grubb* v. *Public Utilities Commission*, 281 U. S. 470, 478-9 (1930), and *Chicot County Drainage District* v. *Baxter State Bank*, 308 U. S. 371, 378 (1940). And see *Farmers National Bank* v. *Wilkinson*, 266 U. S. 503, 506 (1925), to the effect that the decision of the appellate court, so determined, is binding on the lower court in subsequent proceedings.

That rule is decisive here. If changes of condition after confirmation of a plan by a District Court are ineffective, as we submit in point 2 below, to impair the rights of security holders under a confirmed plan, the entire Petition is irrelevant as a matter of law. If, on the other hand, and this is our point now, such changes of condition were relevant to the legal issue before this Court in the Rio Grande Appeal, then they were properly urged[5] by the Debtor in that appeal,[6] and the decision of this Court in that appeal conclusively decided them all. This would have been true, under the settled rule, even had they not been presented by the Debtor. It is all the more true seeing that the Debtor asked this Court to deal with the case on that basis, and this Court did so and decided all those contentions against the Debtor. Had this Court intended the same matters to be open to reexamination in further proceedings below, it knew how to say that its decision was without prejudice to further inquiry and adjudication below (*Independent Wireless Telegraph Co.* v. *Radio Corporation of America*, 270 U. S. 84, 86, 1926; *United States* v. *Wabash Railroad Company*, 322 U. S. 198,

[5]Courts of equity customarily shape their decisions so as to do equity at the moment of decision. *Randel* v. *Brown*, 2 How. 406 (1844); *Stonega Coke & Coal Co.* v. *Price*, 106 F. 2d 411 (C. C. A. 4, 1939), *cert. den.*, 308 U. S. 618 (1939), 116 F. 2d 618 (C. C. A. 4, 1940). See *Tennessee* v. *Condon*, 189 U. S. 64, 71 (1903). The Section 77 court is a court of equity. See *Vanston Bondholders Protective Committee* v. *Green*, — U. S. —, 15 L. W. 4063 (Dec. 9, 1946).

[6]Judicial notice is adequate to envisage those broad changes of conditions that are material in such an argument. Opinion of June 10, 1946, in the Rio Grande Appeal, taking judicial notice of market quotations (90 L. ed. at 1147), current earnings reports (90 L. ed. at 1149, n. 29) and current proceedings before the Commission (*id*).

201, 1944). That the Court made no such reservation shows that, what it did, it intended to be respected.

There can, accordingly, be no doubt that this Court's decision in the Rio Grande Appeal concludes the issues put by the Petition, so that it was not competent for any lower court to reexamine and redetermine the same issues. Otherwise its decisions would not conclude, but merely invite a new round of litigation. Even as among courts of equal rank, such a result would contravene important policies that have been formulated here as follows:

> "Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause." (*Baldwin* v. *Iowa State Traveling Men's Association*, 283 U. S. 522, 525-6, 1931)

And more generally:

> "It is just as important that there should be a place to end as that there should be a place to begin litigation" (*Stoll* v. *Gottlieb*, 305 U. S. 165, 172, 1938)

We submit, therefore, that without reference to the further arguments below, the order of the District Court denying the Petition should be affirmed or the appeal dismissed, and the cause be remanded to the District Court for consummation of the Plan.

2. Apart from Point 1, a Plan under Section 77 Becomes Final when Orders Approving and Confirming It Are Finally Affirmed on Appeal.

The decision of this Court in the Rio Grande Appeal is, as submitted in point 1 above, decisive in itself, as including the whole controversy presented by the Petition. But, if of interest, there is an independent legal ground that requires the same result, for it is the intention of Section 77 that, when orders approving and confirming a plan are finally affirmed on appeal, all controversy closes as to participations under the Plan.

However large may be the opportunities under Section 77 for litigation and delay, surely it must have been the Congressional design to provide some determinable time when the controversy closes. One of the declared objectives was, indeed, to avoid the delay that had characterized previous equity practice.[7] The Congress had before it[8] the history of public utility rate regulation, where the absence of any fixed date of decision repeatedly necessitated a new time of computation as the processes of regulation and review accomplished their leisurely course.

But, while business goes on forever, reorganizations are supposed to end, and participations in reorganization had historically been fixed at the single decisive moment of foreclosure sale. So the Congress may well have thought that the only way to provide a workable reorganization system was to prescribe a single decisive date as of which value for reorganization purposes was to be determined. In fact, the House Committee on the Judiciary amended the 1935 Amendment as originally introduced so as to provide that

[7] H. R. Rep. No. 1897, 72d Cong., 2d Sess. (1933) 5.

[8] See H. R. Rep. No. 1283, 74th Cong., 1st Sess. (1935) 3, and Sen. Rep. No. 1336, 74th Cong., 1st Sess. (1935) 3, commenting on the difficulty and expense of valuation.

a plan should not be submitted to stockholders, and thus should provide no participation for stockholders:

> "... if the Commission shall have found, and the judge shall have affirmed the finding, (a) that *at the time of the finding* the corporation is insolvent, or that *at the time of the finding* the equity of such class of stockholders has no value ..."[9]

The Act then proceeds, in subsection (f), to direct that:

> "Upon confirmation by the judge, the provisions of the plan and of the order of confirmation shall, subject to the right of judicial review, be binding upon the debtor, all stockholders thereof ... and all creditors ... Upon confirmation of the plan, the debtor ... shall have full power and authority to, and shall put into effect and carry out the plan and the orders of the judge relative thereto ..."

Those words are explicit and clear. They are sharpened by the reference "subject to the right of judicial review", for that implies that while the determination made by the confirmation order may be revised or upset on appeal, there shall not be any other way of reopening it, as by later pleading in the District Court like the Petition here involved. There is further support for the same result in the text of Chapter X providing for industrial reorganizations, for it contains an express provision that a plan may be modified "before or after its confirmation."[10] The inclusion of this provision in the industrial statute, and its omission from the railroad statute in the face of the industrial precedent, is strong corroboration of the Congressional intent that

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[9]Subsection (e), italics added. See H. R. Rep. No. 1283, 74th Cong., 1st Sess. (1935) 17-18.

[10]Section 222. Similar provision had been made in the prior Section 77B as subsection (f). Act of June 7, 1934, 48 Stat. 912. This was in effect at the time of the 1935 amendment to Section 77.

finally adjudicated orders of approval and confirmation close the controversy.

No argument against this result can be based on the next sentence of subsection (f) providing that

> "The property dealt with by the plan, when transferred and conveyed to the debtor . . . shall be free and clear of all claims of the debtor, its stockholders and creditors, and the debtor shall be discharged from its debts and liabilities . . ."

These words are merely confirmatory of the legal situation created by the final confirmation order, and they can not be given the effect of postponing the moment of change in legal right until a turnover of the property without infringing the plain intention of the two next preceding sentences. At most, these confirmatory words create the familiar situation where an adjudication in equity conclusively determines the rights of the parties, though the formal modification of their prior legal rights may, as a matter of technique, be postponed until the actual execution of the decree. Thus, an agreement to sell land is specifically enforceable in equity, and a decree of specific performance conclusively determines the rights of the parties, though the old legal title may formally remain in the promissor until a deed is delivered in execution of the decree.

Such being the purpose of Section 77, the legislative intent, of course, controls, for the courts sit only to carry out the Act, and it is immaterial for present purposes that, under other sections prescribing reorganization procedure for other enterprises, the entire process of reorganization is

> ". . . open to reëxamination out of time by the District Court, in its discretion, and subject to intervening rights." (*Pfister* v. *Northern Illinois Finance Corp.*, 317 U. S. 144, 152, 1942, dealing with an agricultural composition under Section 75 of the Bankruptcy Act.)

The confirmation order affirmed by this Court is, by its terms, a complete and final disposition of the Debtor's case. The words are:

> "(b) The provisions of the Plan and of this Order shall forthwith become and be, and are hereby declared to be, final and binding, upon the Debtor and the Subsidiary Debtor, and all of their respective stockholders . . . and all creditors . . .
>
> "(d) The rights of all stockholders and creditors . . . shall be only those provided by the Plan.
>
> "(e) The Debtor . . . is, authorized and directed, and shall have full pow[illegible] and authority, to take all steps, and do all things, necessary . . . to put into effect and carry out the Plan and the orders of this Court relative thereto . . .
>
> "(i) This order shall become, and it is hereby declared to be, effective immediately upon its entry . . ." (Tr. 230, 232).

So Section 77 contemplates that a confirmation order shall be put in final form, and, when put in that form, shall finally conclude all questions of participation under the Plan. The Confirmation Order here involved purported to do just that. Its final affirmance by the orders of this Court entered June 10, 1946, and October 28, 1946, completed the adjudication of the controversy. It could not be reopened by the Petition, and the order of the District Court denying the Petition should be affirmed or the appeal dismissed. Any other rule would entitle the losing parties, always more disposed for delay than surrender, to successive appeals from each successive refusal to vacate the confirmation order. This would paralyze the Congressional scheme as a practical method to accomplish reorganizations.

These dangers are particularly real in the case of reorganizations under Section 77, where the consummation of

a plan is a task of such length and complexity. This is well illustrated by the circumstances of the present case, which may, so far as embodied in proceedings before the Commission or the District Court, be judicially noticed. They are briefly summarized in the following paragraph.

The Reorganization Committee provided in the Plan to effect its consummation was designated upon confirmation of the Plan by the District Court on November 29, 1944. On account of the pendency of appeals from the confirmation order, the Committee was inactive until the decision of this Court on June 10, 1946. Immediately thereafter the Committee formulated plans and adopted a program for consummating the reorganization. (Report and order, Interstate Commerce Commission, *Denver & Rio Grande Western Reorganization*, Finance Docket No. 11002, decided October 9, 1946.) The Reorganization Committee prepared drafts of the new mortgages, escrow agreements, exchange agency and bond scrip agency agreements, charter amendments, by-laws, merger agreement, supplemental indentures, releases, trustees' deeds and forms of new securities, and solicited bids from various corporate fiduciaries for their services as indenture trustees, depositaries, transfer agents, registrars, escrow agents, exchange and bond scrip agents, and for printing and engraving the new securities. On the basis of such bids the Commission, after hearing, entered an order fixing the maximum allowances of such expenses. (Order, Interstate Commerce Commission, October 9, 1946, *supra*.) Pursuant to the Plan a vote of Salt Lake Income Bondholders was taken on their acceptance or rejection of the proposal to modify their bonds so as to permit consolidation of the Denver & Salt Lake with the Rio Grande as a part of the consummation of the reorganization. Balloting began on July 30, 1946, and closed on October 28, 1946. The Circuit Court's stay order of November 2, 1946, by its terms pre-

vented any further action by the Reorganization Committee pursuant to the order of the District Court of November 29, 1944, confirming the Plan, and the mandate of this Court dated August 27, 1946, affirming it. Among petitions then pending in the District Court which had been set for November 6, 1946, and which were thereby stayed, were the following: (1) Petition for leave to file an application with the Commission for authority under Section 20a of the Interstate Commerce Act to transfer the properties of the Debtor and certain subsidiaries to the Reorganized Company, and to issue securities and assume obligations and liabilities as contemplated by the Plan; (2) Petition for an order on the report of the Reorganization Committee that more than 90% in aggregate principal amount of Salt Lake Income Bonds had accepted the proposal for modification of such bonds and unification of the affected subsidiary lines with those of the Debtor; and (3) Petition for an order approving the selection by the Reorganization Committee of the corporate fiduciaries, necessary to the consummation of the Plan. Proceedings under these pending petitions as well as all other final steps to consummate the Plan were thereby stayed. (R. 27-28)

If, after completion of judicial review of orders of approval and confirmation, the question of who may participate is still open to litigation, the time never comes when one is surely justified in undertaking the labor and expense prerequisite to consummating a plan.

3. Apart from Points 1 and 2, the Debtor's Petition, if Permissible at all, was a Petition for Rehearing and the District Court's Denial of it was Not Appealable, and in any case such Denial was Plainly Right.

As pointed out above, the Confirmation Order had declared that the provisions of the Plan are final and binding

and directed the Debtor to take all steps necessary to put it into effect. The Petition, on the other hand, asked the District Court for an order (*a*) "vacating and setting aside" the orders approving and confirming the plan and (*b*) "referring this proceeding back to the Interstate Commerce Commission for the formulation of a New Plan" (R. 9). Plainly, therefore, it was a petition for a rehearing.

It is settled law, in bankruptcy proceedings as elsewhere, that

> "An appeal does not lie from the denial of a petition for rehearing." (*Pfister* v. *Northern Illinois Finance Corp.*, 317 U. S. 144, 149-50, 1942, under Section 75 of the Bankruptcy Act)

It is uniformly recognized that this rule applies under Section 77, and that motions to vacate or modify orders, as the Petition here was in terms, are petitions for rehearing within the meaning of this rule. *Old Colony Trust Co.* v. *Kurn*, 138 F. 2d 394, 395 (C.C.A. 8, 1943); *In re Chicago, Milwaukee, St. Paul & Pacific R.*, 155 F. 2d 489, 492 (C.C.A. 7, 1946), *cert. den. sub nom. Orton* v. *Group of Institutional Investors*, — U. S. —, 91 L. ed. 44 (Oct. 14, 1946). This was tersely put in the first of these cases as follows:

> "'Motions to vacate orders, motions for rehearings or for new trials, and like motions are addressed to the discretion of the trial court and are intended to call its attention to errors allegedly committed by it and to afford an opportunity for their correction. Orders granting or denying such motions are not appealable.' [citing authorities] A motion to modify a judgment falls into the same category as a motion to vacate or for a rehearing. That this court is without jurisdiction of an appeal from an order dismissing a motion to modify a judgment is too well settled to require discussion." (138 F. 2d at 395)

This rule is especially responsive to the policies of Section 77 as applied to an order confirming a Plan. There are, as submitted in point 2 above, strong indications of Congressional intention to make the confirmation order, when finally affirmed on appeal, dispositive of the controversy. But if an exception be implied by equity tradition, surely it should be no broader than the equity tradition, and the privilege of further review where there has occurred such a revolutionary change of conditions as would make the consummation of a plan unconscionable is thus a discretionary privilege of the District Court alone. It is the Judge of the District Court who has supervised the administration of the properties and it is his court that, under the Act, is made a part of the composite tribunal, closely "brigaded" with the Commission (*Palmer* v. *Massachusetts*, 308 U.S. 79, 87, 1939), to weigh and determine matters of fact. To its conclusions this Court attributes "especial weight" in view of his "familiarity with the reorganization" (Rio Grande Appeal, 90 L. ed. 1154).

It would be wholly inconsistent with the statutory scheme to permit the institution, at such a point, of an independent proceeding in the nature of the old bill of review, in such manner as to permit a sequence of new appeals from an order of denial. If any opportunity be permitted for reconsideration by the chancellor after fulfillment of the whole process of review contemplated in the Act by the Commission, the District Court, the Circuit Court and this Court, surely there could have been no intention to permit such reconsideration as an independent step subject to the same right of subsequent appeals.

While the statutory scheme alone is decisive against any theory of a bill of review as applied to an order confirming a plan under Section 77, we may briefly notice that, by the very tradition of a bill of review, such a bill will not lie, after an appeal, except upon consent of the highest appellate court

that has acted in the case, for courts sit to reach conclusions and not to create starting points for further litigation. So this Court has said, speaking of a bill of review to impeach a judgment that had been reviewed by an appellate court:

> "Such a judgment, it was said, was not subject to impeachment in such a proceeding because a trial court lacks the power to deviate from the mandate of an appellate court. The solution evolved by the courts is a procedure whereby permission to file the bill is sought in the appellate court. . . The petition must contain the necessary averments, supported by affidavits or other acceptable evidence; and the appellate court may in the exercise of a proper discretion reject the petition, in which case a bill of review cannot be filed in the lower court." (*Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U.S. 238, 248, 1944).

This is accepted as standard practice:

> ". . . the bill itself is directed to the lower court, but it can only be entertained and determined by that court with the consent of the higher one, after the latter has reviewed the record; and this is true even when the ground of the bill is newly discovered evidence. . ." (*Cyclopedia of Federal Procedure*, Vol. 8, Sec 3603, pp. 352-3, 2d Ed. 1943)[11]

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[11] Nor can the Petition be called a "supplemental bill." That phrase was used in *Atchison, Topeka & Santa Fe R.* v. *United States*, 284 U. S. 248 (1932), to characterize a petition by the railroads to the Commission setting up the "radically different" situation that had come into being in 1931 as against 1929, when the record in a rate proceeding had been closed, and asking for a new determination of rates. The railroads are entitled to ask for a new determination of rates, and to obtain one as of right, at an, time when the circumstances warrant. But reorganizations, as we suggest in the text above, are expected to come to an end at some time. So far as the *Atchison* case required a rehearing of an administrative question, it was "promptly restricted . . . to its special facts" (*I.C.C.* v. *Jersey City*, 322 U. S. 503, 515, 1944), and is no longer authority.

So we come back to the point that the Petition is a petition for rehearing, and the denial of a petition for rehearing is not appealable.

If exceptions to that rule exist where the trial court re-examines the merits of its original decision (*Pfister Case*, above), or may be assumed where the trial court has clearly been governed by an erroneous conception of law or has failed to exercise its discretionary privilege to appraise the factual situation (*In re Equitable Office Building Corp.*, C.C.H. Bankr. Serv., ¶ 55,722, Aug. 6, 1946), they are inapplicable where, as here, the trial court does not reexamine the merits of its original decision, and does not proceed under any misconception of governing law, but exercises, upon full and careful consideration, its discretionary privilege to appraise the factual situation and finds that:

> ". . . the Petition for Rehearing fails to state a case which justifies reconsideration by this Court of the issues already determined." (R. 14).

The action of the District Court is, as the *Pfister Case* shows, to be derived from its order, and there may, accordingly, be no need to go beyond and look at the facts on which the court acted. But that is unimportant here, because only a short statement of the facts will suffice to show that the discretion of the District Court was fully and reasonably exercised and, indeed, that its decision was plainly right, so that its order should be affirmed on that independent ground were this Court to consider that the preferable course. In the rest of this point, we look at the facts for this dual purpose.

The Petition was weighed, and rightly so, not only in the light of the whole record in these proceedings, but also in the light of all circumstances of which the District Court might properly take judicial notice, for a judge is never

compelled to accept as true the allegations of a pleading that he judicially knows to be untrue.[12] The doctrine of judicial notice is applied more broadly than usual in such situations because of the public policies involved and the fact that:

> "The administration of an insolvent operating property during receivership is so largely a practical business matter that the chancellor gains an experience and insight into the property, its condition, its needs and the relative attitude of interested parties which can never, in its entirety, be transmitted to the printed record." (*Kansas City Terminal R.* v. *Central Union Trust Co.*, 28 F. 2d 177, 184, C.C.A. 8, 1928, *cert. den.*, 278 U. S. 655, 1929).

Thus Walter H. Sanborn, C. J., said, in passing on objections to confirmation of a foreclosure sale to accomplish an equity reorganization of a railroad:

> "In the consideration of that question the court cannot divest itself of experience, nor of its knowledge of the course of proceedings in the receivership and . . . the operation of the railroad company, the income derived from the operation of the railroad . . . ; nor can it divest itself of the knowledge which comes from an acquaintance with the earnings of the property . . ." (*North American Co.* v. *St. Louis & San Francisco R.*, 28 F. 2d 174, E.D. Mo. 1926)

The oral observations of Judge Symes in denying the Petition are, therefore, of special interest (R. 77-83). He had heard argument for nearly a full day. His comments are addressed to changes of condition since his prior action. Those changes, he pointed out, contrary to the allegations of the Petition, were in fact adverse to the Debtor's conten-

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[12] *Louisville & Nashville R.* v. *Palmes*, 109 U.S. 244 (1883); *State* ex rel. *Remick* v. *Clousing*, 205 Minn. 296, 285 N.W. 711 (1939); see *Nortz* v. *United States*, 294 U. S. 317, 324-5 (1935); *Finney* v. *Guy*, 189 U. S. 335, 344 (1903).

tions, for gross revenues "have been steadily falling off ever since the conclusion of the war" (R. 78), and operating expenses had "greatly increased" without any "indication that they will not be increased in the future, and the probabilities are they will be" (R. 78). As a result, net railway operating income through August, 1946, was less than 2 million dollars, as compared with 12 million in the corresponding period of 1943, when the Commission acted (R. 78). In conclusion on that point he said:

> ". . . I fail to see any ground upon which it can be said that the earnings of this property will justify the issuance of any further securities. If they were issued they would be absolutely valueless because of the inability of the property to earn or pay any return thereon." (R. 78)

Commenting then on the Geneva Steel Plant, Judge Symes pointed out that the net earnings from that traffic would be inconsiderable in amount, even before reflecting the consequent loss of revenue on long-haul shipments from the East that would be displaced by such new business (R. 79). The road's competitive position would be seriously affected for the future, he went on to say, by the resumption of intercoastal shipping through the Panama Canal, which had been temporarily suspended by war conditions (R. 79-80).

He was, in fine, of the view that the Petition had no equity or merit because

> ". . . most, if not all, of the questions presented and raised in this petition have been thoroughly rehashed time and time again, not only before the Commission,

> but in this Court . . . the decision of that [Circuit] Court reversing the opinion of this Court presented these questions very squarely to the Supreme Court . . . All legal remedies have been exhausted, and the objectors have at all times had a fair hearing before the Commission and the Court, with a full opportunity to be heard in making any kind of a record or argument they wanted, and it seems to me it is time for the opposition to this plan to bow to the inevitable." (R. 81-82)

In the oral argument before Judge Symes, it had been pointed out that any contention of a decline in interest rates since this Court's decision in the Rio Grande Appeal on June 10, was manifestly counter to the plain facts of experience. On June 10, 1946, the Dow-Jones average of 10 first-grade rail bonds was 117, and the Dow-Jones average of 10 second-grade rail bonds was 101. On October 30 they had declined to 110 and 89, respectively. This reflects, of course, a substantial rise in interest rates. The when-issued market quotations for the new securities under the Plan had also shown a marked deterioration. On June 10, 1946, the bid for the new First's was 101 and for the new Income's 79. On November 1 the corresponding figures were 90 and 59.[13] So clearly the Petition failed to state any case on that point that might justify reconsideration.

Nor could there be any serious suggestion that there had been any improvement in economic conditions or prospects since the decision of this Court on June 10, 1946, or since the earnings period considered in the Court's opinion. In support of its conclusion, this Court took judicial notice of the operating reports of the Rio Grande for January and February of 1946 and pointed out that operating revenues

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[13]All these quotations are from "The Commercial & Financial Chronicle" of June 10, 1946, June 17, 1946, and November 4, 1946.

for that period were 18% below the corresponding period of 1945 (90 L. ed. at 1149, n. 29). Operating revenues of the Rio Grande through August of 1946, which were in the record before the District Court, show a decrease of 37% under the corresponding period of 1945, or twice the percentage decline considered in this Court's opinion. The operating ratio in the first 8 months of 1946 was 86% as compared with 61% in the corresponding period of 1945 and 69% for the corresponding period of 1944, immediately preceding the Confirmation Order. There has been no decrease in cost levels since June 10, and they are an even more fundamental cause of the drastic decline in railroad earning power. On the contrary, it is a fact of common knowledge, and the Court may judicially notice, that the trend of costs has continued upward. The large wage increases of January 1, 1946, the addition made to them by the Crosser Bill of July 31, 1946 (raising payroll tax deductions), and the sharp increases during 1946 in the various standard indices of consumers' prices and wholesale prices are familiar to all.

In the opinion of June 10 this Court took judicial notice of the petition filed by the railroads before the Commission on April 15, 1946, for increased freight rates, and quoted from the petition as to the "critical" situation of the railroads in view of the great increases in wages and in costs and material and supplies and the decline in traffic and revenues from the war-time peak. The Court then concluded:

> "The Denver apparently did not vary greatly from this over-all picture." (90 L. ed. 1149, n. 29).

The fundamentals of this situation are in no way changed by the Commission's recent decision in that proceeding ap-

proving a rate increase of 17.4%."[14] It is clear from the Commission's Report (sheet 5) that the authorized increase is designed to be less than half the aggregate increase in operating costs resulting from the rise, already experienced since 1939, in wages and in prices of material and supplies. No new era of earnings can be said to have opened when the railroads are reimbursed for only part of the increases in costs already sustained and must still struggle by increased efficiency to achieve and maintain the level of earnings for which the Plan hopes.

All these and other circumstances, except only the Commission's increased rate decision, which was rendered after the hearing below, were reviewed at length in argument by both sides before the District Court. It is clear from the course of the hearing (R. 32 *et seq.*), the oral observations of Judge Symes (R. 77-83) and the order in which his conclusions were finally embodied (R. 14), that there was no abuse of discretion on his part, but, on the contrary, that his discretionary privilege to appraise the factual situation was carefully and reasonably exercised.

The case, therefore, is governed by the classic rule already stated that from the denial of a petition for rehearing, no appeal lies. The Debtor's appeal, therefore, should be dismissed. Or, in the alternative, the decision of the District Court that no changes of condition had occurred except changes of an adverse nature was plainly right, and its order of denial should be affirmed. As the Seventh Circuit Court of Appeals said in dismissing an attempted further

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[14] *Increased Railway Rates, Fares and Charges, 1946, Ex Parte No. 162*, December 5, 1946, and the Commission's press release on that decision dated December 6, 1946.

appeal by the debtor corporation in the Milwaukee Reorganization after the decision of this Court in *Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul & Pacific R.*, 318 U. S. 523 (1943):

> ". . . any further review would be little more than an idle and useless ceremony. It is hardly within the range of possibility that appellants could benefit thereby. On the other hand, the delay occasioned would prove detrimental to the public interest and prolong the goal which has long been sought, that is, the final consummation of the Plan." (*In re Chicago, Milwaukee, St. Paul & Pacific R.*, 145 F. 2d 299, 304, 1944, *cert. den. sub nom. Park* v. *Group of Institutional Investors*, 324 U. S. 857, 1945, *reh'g. den.* 325 U.S. 895, 1945)

CONCLUSION

On the ground that this Court's decision of June 10, 1946, on the merits of the Rio Grande Appeal, and its denial of petitions for rehearing on October 28, 1946, adjudicated all the issues presented by the Petition, we submit that the Petition was purely repetitive and interposed for mere delay and the order of the District Court denying the Petition should be affirmed or the appeal dismissed, so that this reorganization, already so long delayed, may now move forward to completion in accordance with the mandate of this Court. Since that ground alone is decisive, the case need not be decided on any broader grounds. But on three other grounds, each alone decisive, the same result is required, first, that Section 77 intends the controversy over a plan to be closed by final affirmance of orders approving and con-

firming the plan, second, that the denial of a petition for rehearing affords no ground for further appeal, and, third, that the decision of the District Court was plainly right.

Dated December 31, 1946.

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APPENDIX

Section 77(f) of the Bankruptcy Act, as Amended.

"Upon confirmation by the judge, the provisions of the plan and of the order of confirmation shall, subject to the right of judicial review, be binding upon the debtor, all stockholders thereof, including those who have not, as well as those who have, accepted it, and all creditors secured or unsecured, whether or not adversely affected by the plan, and whether or not their claims shall have been filed, and, if filed, whether or not approved, including creditors who have not, as well as those who have, accepted it. Upon confirmation of the plan, the debtor and any other corporation or corporations organized or to be organized for the purpose of carrying out the plan, shall have full power and authority to, and shall put into effect and carry out the plan and the orders of the judge relative thereto, under and subject to the supervision and the control of the judge, the laws of any State or the decision or order of any State authority to the contrary notwithstanding. The property dealt with by the plan, when transferred and conveyed to the debtor or to the other corporation or corporations provided for by the plan, or when retained by the debtor pursuant to the plan, shall be free and clear of all claims of the debtor, its stockholders and creditors, and the debtor shall be discharged from its debts and liabilities, except such as may consistently with the provisions of the plan be reserved in the order confirming the plan or directing such transfer and conveyance or retention, and the judge may require the trustee or trustees appointed hereunder, the debtor, any mortgagee, the trustee of any obligation of the debtor, and all other proper and necessary parties, to make any such transfer or conveyance, and may require the debtor to join in any such transfer or conveyance made by the trustee or trustees. Upon the termination

of the proceedings a final decree shall be entered discharging the trustee or trustees, and making such provisions as may be equitable, by way of injunction or otherwise, and closing the case. Upon confirmation of a plan the Commission shall, without further proceedings, grant authority for the issue of any securities, assumption of obligations, transfer of any property, sale, consolidation or merger of the debtor's property, or pooling of traffic, to the extent contemplated by the plan and not inconsistent with the provisions and purposes of the Interstate Commerce Act as now or hereafter amended. The provisions of Title I and of section 5 of the Securities Act of 1933, as amended, shall not apply to the issuance, sale, or exchange of any of the following securities, which securities and transactions therein shall, for the purposes of said Securities Act, be treated as if they were specifically mentioned in sections 3 and 4 of said Securities Act, respectively: (1) All securities issued pursuant to any plan of reorganization confirmed by the judge in accordance with the provisions of this section; (2) all securities issued pursuant to such plan for the purpose of raising money for working capital and other purposes of such plan; (3) all securities issued by the debtor or by the trustee or trustees pursuant to subsection (c), clause (3) of this section; (4) all certificates of deposit representing securities of, or claims against, the debtor, with the exception of such certificates of deposit as are issued by committees not subject to subsection (p) of this section. The provisions of subdivision (a) of section (14) of the Securities Exchange Act of 1934 shall not be applicable with respect to any action or matter which is within the provisions of subsection (p) hereof."

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY REORGANIZATION

When Issued Prices and Values Under the Plan

	When Issued Prices (*) 1946 High	Low	(**) Jan. 2, 1947
First Mortgage 3-4s, 1993	102¼	90½	90
Income 4½s, 2018	86	53½	61
Preferred Stock	77¼	40	51
Common Stock	40¼	17	17½

	(#) Realization Per cent of Claim on bases of— High	Low	Jan. 2, 1947
Western Trusts	97.94%	80.69%	82.31%
Western Consols	76.41	41.09	50.66
Eastern Consols	71.30	45.93	49.84
R. & I.'s	64.53	39.19	42.62

SOURCE

(*) Monthly closing prices (average between bid and ask) from Bank and Quotation Record, published by Commercial and Financial Chronicle.

(**) Average between bid and ask prices from Wall Street Journal Jan. 3, 1947.

(#) The new securities allotted in the Plan to each old bond are taken at the indicated prices and their total is then expressed as a percentage of principal and interest on that bond to the stated effective date of the Plan on January 1, 1943.

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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 690

INSURANCE GROUP COMMITTEE, REORGANIZATION COMMITTEE, GUARANTY TRUST COMPANY OF NEW YORK, Trustee, CENTRAL HANOVER BANK AND TRUST COMPANY, Trustee, UNITED STATES TRUST COMPANY OF NEW YORK, Trustee, and THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Trustee,

Petitioners,

vs.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, *et al.*,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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IN THE

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INSURANCE GROUP COMMITTEE, REORGANIZATION COMMITTEE, GUARANTY TRUST COMPANY OF NEW YORK, Trustee, CENTRAL HANOVER BANK AND TRUST COMPANY, Trustee, UNITED STATES TRUST COMPANY OF NEW YORK, Trustee, and THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Trustee,

Petitioners,

vs.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, *et al.*,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Statement

This Brief is filed by The Denver and Rio Grande Western Railroad Company, Debtor, and The Denver & Salt Lake Western Railroad Company, Subsidiary Debtor (herein together called the Respondents) in opposition to a Petition of an Insurance Group Committee and others for a writ of *certiorari* to review an Order entered on November 2, 1946 in the United States Circuit Court of Appeals for the Tenth Circuit by Circuit Judge PHILLIPS in a reorganization proceeding under Section 77 of the National Bankruptcy Act (Petition, page 1).

The Order of the Circuit Court of Appeals which the Petitioners seek to have reviewed in this Court is one which does no more than preserve the status of the litigation pending a review by that Court pursuant to an appeal regularly taken and perfected of an Order of the District Court of the United States for the District of Colorado (Judge SYMES) denying a Petition of the Respondents asking that the proceeding be referred back to the Interstate Commerce Commission for the formulation of a new Plan of Reorganization (Record, pages 10, 14).

The certified Plan of Reorganization had been approved and confirmed by the District Court by Order dated October 25, 1943 and November 29, 1944, respectively, and these Orders were affirmed and reinstated by this Court under its decision rendered June 10, 1946. (*Reconstruction Finance Corporation* v. *Denver and Rio Grande Western Railroad Company*, 90 L. Ed. 1134; 1138.)

The Respondents' Petition filed in the District Court September 17, 1946, does *not* embrace or relate to any matter heretofore determined by this Court under writs of *certiorari* previously issued in connection with the certified Plan but alleges and presents formally for the first time a new situation and a radically different one which had supervened *after* the record in the Interstate Commerce Commission had been closed and which became demonstrable by provable facts *after* the District Court had entered the Orders affirmed and reinstated by this Court under its decision rendered June 10, 1946 (Record, page 2). This Petition presenting a cataclysmic economic change which had rendered unfair and inequitable and against the public interest as well as confiscatory the Plan of Reorganization for the Respondents theretofore approved and confirmed by the District Court was filed by the Respondents under authority of the decisions of this Court cited below in accordance with procedure approved by this Court in *Atchison, Topeka and Santa Fe Railroad Company* v. *United States*, 284 U. S. 248 and was

not, as the Opinion of Chief Justice HUGHES in the latter case plainly shows a Petition for Rehearing but was "a Petition in the nature of a Supplemental Bill" alleging new and radically altered economic conditions.[1]

The Order of the Circuit Court of Appeals sought by the Petitioners to have reviewed by this Court is in principle and in substance indistinguishable from the Order entered on August 6, 1946 in this Court by Mr. Justice REED in the *Matter of the Equitable Office Building Corporation* except that the stay granted by Mr. Justice REED was to preserve the status of the litigation pending possible review by this Court of an Order of the Circuit Court of Appeals in the Second Circuit which denied a stay whereas such a stay was in fact granted by the Order of November 2, 1946 entered by Circuit Judge PHILLIPS.[2]

In preparing the opposing Brief counsel for the Respondents have felt constrained in the interest of accuracy and of a correct understanding on the part of this Court of the factual situation and of the "Questions Presented" to disregard much, if not most, of what is said by the Petitioners and to state our own conception of the facts and to restate the Questions presented for consideration and determination by this Court. Again (since this is not our first complaint) the technique employed by the supernumerous counsel for the Petitioners seems designed to confuse rather than to inform and to complicate rather than to simplify.

We shall endeavor to be brief.

---

[1] The Petition (page 2, par. 2) invokes the Opinions of this Court in *Ecker* v. *Western Pacific Railroad Corporation and others*, 318 U. S. 448; *Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul and Pacific Railroad Company*, 318 U. S. 448; and *Reconstruction Finance Corporation* v. *Denver & Rio Grande Western Railroad Company*, 90 L. Ed. 1134; 1138.

[2] The stay granted by Mr. Justice REED was in the case now pending in this Court on Petitions for *certiorari* under title *Charles A. Dana and others* v. *J. Donald Duncan, as Trustee*, Oct. Term, 1946, Nos. 609-612.

The Facts

The facts in addition to those stated above will be developed when needed in connection with the Argument. It should be emphasized, however, at this point that by the motion to dismiss all factual allegations of the Petition have been admitted to be true.

Questions Presented

I

Is the Circuit Court of Appeals authorized by law to stay proceedings in the District Court in order to preserve the status of the litigation pending exercise by it of its lawful appellate authority to review a determination of the District Court in a proceeding under Section 77 of the National Bankruptcy Act?

II

Is the Circuit Court of Appeals authorized by law to review an Order of the District Court denying on several grounds involving the merits a Petition of a Debtor in a proceeding under Section 77 of the National Bankruptcy Act to refer back to the Interstate Commerce Commission an approved and confirmed Plan of Reorganization alleging a new situation and "cataclysmic" economic changes which render the Plan unfair, inequitable and contrary to the public interest as well as confiscatory?

ARGUMENT

I

It is a part of the inherent and statutory authority of the Circuit Court of Appeals to stay proceedings in the District Court in order to preserve the status of the litigation pending exercise by it of its lawful appellate jurisdiction to review a determination of the District Court in a proceeding under Section 77 of the National Bankruptcy Act.

The foregoing proposition is implicit in the Opinion of Mr. Justice REED in the *Matter of the Equitable Office Building Corporation* referred to in our preliminary statement.[3] We are content to rest upon the analysis he makes and the authorities he cites. Reference accordingly is here made to U. S. Code, Sections 377 and 378 and to Bankruptcy Act, Section 2 (13) and Section 24.

The power to grant the stay is, however, necessarily dependent upon the appellate authority to which it is auxiliary.[4]

---

[3] This Opinion is part of a record in this Court in connection with Petitions for certiorari in *Dana and others* v. *J. Donald Duncan, as Trustee*, Nos. 609-612.

[4] *Marbury* v. *Madison*, 1 Cranch, 137 (173-180); *Ex Parte Seibold*, 100 U. S. 371; *Ex Parte Peru*, 318 U. S. 578.

II

The Circuit Court of Appeals is authorized to review the Order of the District Court denying on several grounds involving the merits a Petition in a proceeding under Section 77 of the National Bankruptcy Act for a reference of the proceeding back to the Interstate Commerce Commission on the basis of admitted allegations of a new situation and "cataclysmic" economic changes which render the existing Plan of Reorganization unfair, inequitable and contrary to the public interest as well as confiscatory.

This head-note naturally divides into two constituents:

(A) *The Law,* (B) *The Facts.*

(A) *The Law:* The appellate authority of the Circuit Court of Appeals to review the Order of the District Court is granted by Section 24 of the Bankruptcy Act which as amended provides:

> "a. The Circuit Courts of Appeals in the United States * * * in vacation, in chambers and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction from the several courts of bankruptcy in their respective jurisdictions in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy to review, affirm, revise or reverse both in matters of law and in matters of fact * * *."
>
> "b. Such appellate jurisdiction shall be exercised by appeal, and in the form and manner of appeal."
>
> (11 U. S. C. A. 47)

Under this Section practically all orders in bankruptcy are appealable within 30 days as of right or grace. *In re*

Fox West Coast Theatre, 88 Fed. 212, *certiorari* denied, 301 U. S. 710, 302 U. S. 772.

(B) *The Facts:* The Order of the District Court from which an appeal pursuant to the above authority is pending in the Circuit Court of Appeals determines (we contend erroneously) two justicable issues:

> (a) that the Order of November 29, 1944 (being the District Court Order of confirmation) having become final, conclusively determines all controversies concerning the Plan and the rights of the various classes of security holders to participate and it is not now competent for the Debtor to reopen those proceedings; and
>
> (b) that the Petition for Rehearing (sic.) fails to state a case which justifies reconsideration by this Court of the issues already determined (Record, fol. 14).

Disregarding the technical language here used in an effort to give the Respondents' Petition the character of one for a "Rehearing" (which it is not) the position of the Petitioners is (a) that the Order of Confirmation is a final decree which cannot be reopened; and (b) that because the Respondents in their Petitions in Nos. 278, 279, 280, 281 and 282—October Term 1945—had asked this Court to take judicial notice of the economic trends underlying their Petition in the District Court to which the above quoted Order relates this Court by its denial of those Petitions had foreclosed consideration of those new factors in the further progress of the proceeding.

Let it be noted first that the order of confirmation possesses no such quality of finality as Petitioners aver but is merely a step in the administration of the estate (*Wayne United Gas Company* v. *Owens-Illinois Glass Company*, 300 U. S. 131; *Meyer* v. *Kenmore Hotel Company*, 297 U. S. 160; *In re 1934 Realty Corporation*, 150 Fed. 2d, 477. Indeed

the opinion of this Court in this very case expressly precludes the claim that no further inquiries as to such major economic changes can be had (see pamphlet copy of opinion of Mr. Justice REED, page 18). Nor is there any indication that this Court attributed to the order of confirmation any such finality. On the contrary the mandate from this Court to the District Court was that "further proceedings be had in said cause *as according to right and justice* and the laws of the United States ought to be had, the said writs of *certiorari* notwithstanding."

It is well established as a basic principle of equity—and equity can only be what is right and just—that the Court may not enter a final decree or make any final disposition of a proceeding if the effect of conditions which have supervened since the record closed is to render such decree or disposition unfair and inequitable.

Reference is here made to the following authorities:

Randal v. *Brown*, 2 How. 406, 423;
Graffam v. *Burgess*, 117 U. S. 180, 192;
Atchison, Topeka & Santa Fe Railway Company v. *United States*, 284 U. S. 248;
Central Kentucky Natural Gas Company v. *Railroad Commission*, 290 U. S. 264;
United Corporation v. *Federal Trade Commission*, 110 F. (2d) 473.

In addition to these early cases we invoke the decisions of this Court in the cases of *Ecker* v. *Western Pacific Railroad Corporation and others*, 318 U. S. 448, and *Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul and Pacific Railroad Company*, 318 U. S. 523, and the Opinion of Mr. Justice REED in the instant case rendered June 10, 1946. Recognizing the significance of these recent decisions on this phase Mr. Justice REED in his opinion in the *Equitable Building Corporation* case says:

"The effect of unanticipated changes of economic conditions after confirmation on the propriety of subsequent action by the reorganization Court to protect the interest of junior creditors also has not been judicially determined, finally."

The Order of the District Court now under review in the Circuit Court of Appeals presents this question in the regular way for determination by that Court. There is no persuasive reason why its appellate jurisdiction not yet exercised should be displaced. On the contrary it is the scheme of the Judiciary Act and the tradition of this Court to allow questions of this nature to be determined in the first instance by the Circuit Courts and not to intervene unless they disagree. The argument advanced by the Petitioners for a departure from this settled practice is that the new situation and the cataclysmic economic change upon which the Respondents' Petition avowedly rests were developed in detail in the Petitions for Rehearing filed by the Respondents in this Court following its decision of June 10, 1946. It is true that in those Petitions for Rehearing as well as in their Briefs and argument in this Court the Respondents asked this Court to take judicial notice of certain of the economic changes which they claim establish the injustice of the Plan of Reorganization they now seek to set aside. But the fact that those Petitions were denied by this Court cannot be tortured into an adjudication of that issue.[8] Under the terms of this Court's mandate the proceeding was remanded to the District Court to go forward with the same authority and with the same jurisdiction that it would have possessed if there had been no appeals from the Orders of October 25, 1943 and November 29, 1944.

It is not our purpose to enter into a discussion of the merits of the Respondents' Petition filed in the District Court on September 17, 1946. All of the factual allegations are admitted to be true and are true as a matter of wide-

[8] The subject of judicial notice and its lack of significance is developed by Mr. Justice CARDOZO in the Opinion of this Court in *Ohio Bell Telephone v. Public Utilities Commission of Ohio*, 301 U. S. 292.

spread common knowledge. The Petition alleges a decline in money rates indicating a possible reduction of 1½% in the interest and dividend rates prescribed in the Plan formulated in 1943 which if accomplished would involve an annual saving of $1,539,051. This sum if capitalized at 3½% would provide additional securities in the amount of $43,974,000—more than enough to make whole the holders of the Debtor's General Mortgage Bonds who under the 1943 Plan lose 90% of their investment. (Record, pages 4-7). The Petition alleges the sale by the Government to the United States Steel Corporation *since* the Order of Confirmation dated November 29, 1944 of the mid-continental steel plant at Geneva near Provo, Utah, for private operation. The over-all purchase price is stated to be $47,500,000 plus an undertaking on the part of the purchaser to expend a minimum of $18,600,000 to adapt the plant to the manufacture of steel products in addition to those for which it was constructed. This is a contribution of new earning power not contemplated by the 1943 Plan alone sufficient to provide a return on additional capitalization required to give full recognition to the Debtor's Preferred Stock in the amount of $17,000,000——all of which is lost under the 1943 Plan. (Record, pages 7-9). Finally there are allegations of a post-war national economy vastly different from what was contemplated in 1943. Unless and until the relationship of this new national economy to the raliway industry can be scientifically developed it would be manifestly unfair and unjust to put into effect the 1934 Plan which declares worthless the Common Stock investment in the Debtor held by the Missouri Pacific Railroad Company and the Western Pacific Railroad Corporation in equal shares. It is pertinent hereto note that an economic study as to that precise relationship has been undertaken and is now under way in the Interstate Commerce Commission.

Prior to the time when the gearing of post war national economy with the resultant business volume and national

income and all its relevant incidents was sufficiently evident to be set forth in a petition as a provable reality, many persuasive indications that there would be a very high peace time national economic level were called to the attention of this and other courts. These indications fell short of the demonstration.

Out of consideration of these indications the status of the problem suggested by them was made very clear to be

(a) the Commission is the sole agency for the determination of the economic basis upon which to erect the future capital structure, all details of that structure stemming from the economic basis for the future envisaged by the Commission; that basis is not affected by abnormal earnings (war earnings);

(b) the Commission may predicate its results upon envisioning and forecasting the result of economic trends which have not yet reached a reasonably stable level;

(c) the courts will not substitute judicial appraisement of such trends for a contrary Commission forecast;

(d) the Commission is not precluded from giving subsequent consideration to major economic changes which, if given effect, will materially change the basic assumptions upon which the capitalization and all incidents of the plan are predicated.

Now, and by its petition to the District Court, the Debtor is able to allege and prove the actuality of a cataclysmic change in the peace time level of national income, which is the index of the national productive and distributive effort. This demonstrable economic change reflects an elevation in national economy over prewar depression levels much greater than the drop from pre-depression to depression levels.

The close statistical tie between this national economic level and the volume of service the Debtor is called upon to

render, with its resulting income, is a basic fact recognized in the industry. In the early thirties, the Commission reported to Congress on this relationship and its report is quoted by Justice HUGHES in *Atchison et al.* v. *United States*, 284 U. S. at page 260, as follows:

> "The Commission also recognized in that report 'the very large reductions in railroad earnings which have accompanied the economic depression' and stated that 'the chief cause of these reductions has been loss of traffic.' For 'in such depressions the railroad suffers severely. *Their traffic is a barometer of general business conditions.*'" (Emphasis ours).

Debtor is able to allege with truth that its share of peace time business on the new national level for the year 1946 will yield a gross income greater than it ever realized prior to the depression. The normal net will be proportionate. The whole key to the certified Plan was an assumed level of gross income, "earning power", far below that demonstrated in this peace time era. The new level furnishes a new datum point for the Commission's entire survey and all its incidents. While considering that new high level of gross it can give proper consideration to the new low level of interest rates, the new basis for capitalizing income, and the entirely new situation in which it can approach the problem of its own power to establish rates which will yield a fair return without diverting business to competitive lines. On the thin business of the depression the Commission felt there was no room for such relief without such a diversion of business. No such restriction faces it in view of the great volume of demands in this new peace time era.

The underlying principle of justice in the *Atchison* case is truly not an orphan principle, for it finds recognition by the late Justice STONE in the case of *Central Kentucky Company* v. *Commission*, 290 U. S. 264. Both cases stand for the proposition that when an administrative body makes

an order that extends into the future, it is in duty bound to consider all factors that bear upon the justice of its order as applied to that future. It follows that if and when it appears that great unforeseen changes, which were not and could not be envisaged from the record upon which the order is based, develop to a provable state after such record is closed, it is the duty of the administrative body to resurvey its order in the light of those provable changes.

Certainly there is nothing in Section 77 or its scheme which commands a court of justice to "frustrate" the Commission in the performance of that duty by refusal to give the Commission an opportunity to function. That is all Debtor asks.*

In the *Atchison* case the right to have such a resurvey was asserted as an incident of due process. We quote Justice HUGHES' language:

> "This is not the usual case with possible fluctuating conditions but of a changed economic level and the prospect that the hearing may be long does not justify its denial if it is required by the essential terms of justice."

There ought not to be any serious question that the new situation outlined above and presented in detail in the Respondents' Petition in the District Court is one that should be the subject of scientific inquiry, study and analysis in and by the Interstate Commerce Commission before

---

* Only today was our attention directed to the following striking statement in the Memorandum filed in this proceeding by Reconstruction Finance Corporation:

> "Because of the action of the Congress last Summer in passing the Bill known as S. 1253 and the reasoning of the President's Memorandum of Disapproval, dated August 13, 1946, both of which indicated disapproval of certain features of railroad reorganizations approved pursuant to the provisions of Section 77 of the Bankruptcy Act, which is the existing law, the RFC, as an agency of the United States created and existing by virtue of Congressional enactment, is not taking any position as to whether the petitions should be granted."

May we emphasize here that the Interstate Commerce Commission also is a governmental agency created by and responsible to Congress. Is it to be assumed that a different position will be taken by the Interstate Commerce Commission if and when this proceeding is referred back to it pursuant to the Respondents' Petition now under consideration in the Circuit Court of Appeals?

the Courts execute further cruel death sentences on records and facts dating back to 1943 when this Country was at war with both Germany and Japan and there was no dependable supporting data more recent than that of the pre-war depression.[1]

Finally: This Court can hardly blind itself to the obvious. The Petitioners seek to by-pass the Circuit Court of Appeals in the hope that thereby they may "beat the gun" known to be trained on them by the Congress and the President of the United States. To further such a purpose would indeed be a strange use for the writ of *certiorari*.

---

[1] Attention is directed to the *New York Journal of Commerce* for November 25, 1946. From this it appears that the parties in interest have themselves agreed that the plan of reorganization for the Missouri Pacific Railroad system approved a year or more ago is now obsolete by reason of economic changes and must be abandoned. Application is to be made by them to the Court to send the proceeding back to the Interstate Commerce Commission for a new plan. A revised Plan is to be recommended to the Commission, certain details of which already have been published, which involves the scaling down of the proposed interest and dividend rates for the new securities to conform to the prevailing low levels. General creditors are to be protected and recognition given to the existing issues of both preferred stock and common stock. Under the present plan the unsecured debt and preferred and common stocks would be held worthless. In the same issue of the *Journal of Commerce* reference is made to new proposals conforming to the present day conditions in the proceeding for reorganisation of the Chicago, Rock Island and Pacific Railway Company.

November 27, 1946.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1946

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Respondents.

BRIEF OF THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 690

INSURANCE GROUP COMMITTEE, REORGANIZATION COMMITTEE, GUARANTY TRUST COMPANY OF NEW YORK, Trustee, CENTRAL HANOVER BANK AND TRUST COMPANY, Trustee, UNITED STATES TRUST COMPANY OF NEW YORK, Trustee, and THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Trustee,

Petitioners,

vs.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, *et al.*,

Respondents.

BRIEF OF THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY*

Statement

This proceeding is before this Court on a writ of *certiorari* to review an Order of the United States Circuit Court of Appeals in the Tenth Circuit dated November 2, 1946 entered by Circuit Judge ORIE L. PHILLIPS which stays further action under an Order of the District Court for the District of Colorado dated November 29, 1944 confirming a Plan of Reorganization of the properties of The Denver and Rio Grande Western Railroad Company and its sub-

* The Respondent, The Denver and Salt Lake Western Railroad Company, a wholly-owned subsidiary, concurs in and adopts this Brief. Whenever reference is herein made to the Debtor it shall apply only to The Denver and Rio Grande Western Railroad Company unless otherwise stated.

sidiaries (Tr. fols. 31-32). The stay was granted to preserve the status of the litigation pending disposition of an appeal from an Order of the District Court dated October 30, 1946 (Tr. fol. 32). The Order of the District Court is one denying a Petition of the Respondents asking *inter alia* that the proceeding be referred back to the Interstate Commerce Commission for determination in the light of the revealed facts whether it should not formulate a new Plan of Reorganization (Tr. fols. 16-18). The Petition of the Respondents which in the Order of the District Court is characterized (we think erroneously) as a "Petition for Rehearing" is a Petition in the nature of a supplemental Bill revealing new and radically altered relevant economic conditions (Tr. fol. 4). The filing of such a petition as a matter of right for that purpose is authorized by the decision of this Court in *Atchison, Topeka and Santa Fe Railway Company* vs. *United States*, 284 U. S. 248, and other decisions hereafter cited.

Jurisdiction

The jurisdiction of the Circuit Court of Appeals to review the Order of the District Court is conferred by Section 24a of the National Bankruptcy Act (11 U. S. C. A. 47a). The authority of the Circuit Court of Appeals to stay proceedings in the District Court in order to preserve the status of the litigation pending exercise by it of its lawful appellate jurisdiction is inherent and is fortified by statutory enactment including U. S. Code, Sections 377 and 378, and National Bankruptcy Act, Section 2(13) and Section 24. Reference is here made to the opinion of Mr. Justice REED in the matter of the *Equitable Office Building Corporation* forming part of the record in this Court in connection with Petitions for *certiorari* in *Dana and Others* vs. *J. Donald Duncan, as Trustee*, Nos. 609-612 on the present Docket of this Court.

Question Presented

Mr. Justice REED in his opinion filed in the case last above cited in connection with the Order dated August 6, 1946 staying further proceedings for the reorganization of the Equitable Office Building Corporation says:

> "The effect of unanticipated changes of economic conditions after confirmation on the propriety of subsequent action by the reorganization court to protect the interests of junior creditors also has not been judicially determined finally. Compare *RFC* v. *Denver & R. G. W. R. Co.* 90 L. Ed. 1134, 1148; *Ecker* v. *W. P. R. Co.* 318 U. S. at 506-509."

In view of this very definite statement by the Justice of this Court who wrote the prevailing opinion in the pending proceeding released June 10, 1946, the Respondents assume that a writ of *certiorari* was granted to review the Order of the Circuit Court of Appeals for the purpose of bringing up that precise question for final determination by this Court. Since that stay Order was granted in the Tenth Circuit Petitions similar to that filed in the District Court have been filed in proceedings in the Eighth Circuit for the reorganization of the St. Louis-San Francisco Railroad Company and the St. Louis Southwestern Railway Company, in one of which there has been the denial of a stay. It is understood that similar Petitions have been or will be filed in proceedings in the Second and Seventh Circuits. The question now appears therefore to be one of general public interest in which several Circuit Courts may not be in accord.

Paraphrasing what is said in the above-quoted opinion of Mr. Justice REED the question presented to this Court is—

I

Does the Petition filed by the Respondents in the District Court disclose unanticipated changes of economic conditions of such character, magnitude and impact as to require reconsideration by the Interstate Commerce Commission of the Plan of Reorganization approved and confirmed by the Orders of the District Court which were affirmed and reinstated under the decision of this Court rendered June 10, 1946?

ARGUMENT

I

The Petition filed by the Respondents in the District Court discloses unanticipated changes of such character, magnitude and impact as to require reconsideration by the Interstate Commerce Commission of the Plan of Reorganization approved and confirmed by the Orders of the District Court which were affirmed and reinstated under the decision of this Court rendered June 10, 1946.

In developing the foregoing proposition in its natural subdivisions we shall utilize the captions—*A*, The Law; *B*, The Facts; and *C*, The scope of the decision of this Court rendered June 10, 1946.

A. The Law: It has always been the rule that notwithstanding the entry of a final judgment or decree the Court retains jurisdiction to do justice in a cause until the passing of the Term. A Bankruptcy Court, and this is expressly declared by subsection (a) to be applicable to a proceeding under Section 77 of the National Bankruptcy Act, is a court of equity with a continuous

Term so that even if an order of confirmation in such a proceeding were technically a final decree (which it is not) the District Court would not have lost power to set it aside in furtherance of right and justice. This is the clear import of the following authorities:

Dana and Others vs. *J. Donald Duncan, as Trustee* (*supra*);
Meyer vs. *Kenmore Hotel Corporation*, 297 U. S. 160;
Pfister vs. *Finance Corporation*, 317 U. S. 144.

In the case last cited Mr. Justice REED says:

> "Courts of bankruptcy are courts of equity without terms. * * *. The entire process of rehabilitation, reorganization or liquidation is open to reexamination out of time by the District Court in its discretion and subject to intervening rights."

The District Court did not deny the Petition of the Respondents for a reference of the proceeding back to the Interstate Commerce Commission either in the exercise of a judicial discretion or because of intervening rights but denied the Petition on the merits stating two grounds, neither of which (as the Respondents contend) is a valid one:

> "(a) that the Order of November 29, 1944 (confirmation) having become final, conclusively determines all controversies concerning the Plan and the rights of the various classes of security holders to participate and it is not now competent for the Debtor to reopen those proceedings; and
>
> (b) that the Petition for Rehearing fails to state a case which justifies reconsideration by thi Court of the issues already determined."

That the Order of confirmation is not a final determination is, we submit, thoroughly established by the authorities cited above and further discussion seems idle. Never-

theless it may be pertinent to refer this Court to statutory confirmation found in subsections (a), (f) and (g) of Section 77. Subsection (a) provides that the District Court shall have exclusive jurisdiction of the Debtor and its property wherever located and shall have and may exercise all powers which a Federal Court would have had it appointed a receiver in equity of the Debtor's property. The same subsection also provides that the Supreme Court of the United States shall promulgate rules which it may deem advisable in order to aid the District Courts and the Circuit Courts of Appeal in exercising jurisdiction conferred upon them.

Pursuant to this statutory authority this Court promulgated General Order XLIX relating to proceedings under Section 77. This provides in subsection (p) for a motion to dismiss the proceedings because of undue delay; in subsection (u) for an order confirming the plan (such was the order entered in this proceeding on November 29, 1944) and which is to be supplemented by any order directing the transfer or other disposition of the property; and finally subsection (v) for *"the final decree."*

Subsection (f) provides that upon the termination of the proceeding there shall be a *"final decree"* discharging the trustee or trustees and making such provisions as may be equitable by way of injunction or otherwise and closing the case.

Subsection (g) provides that if in the light of all existing circumstances there is undue delay in a reasonably expeditious reorganization the judge shall in his discretion after hearing and after consideration of the recommendation of the Commission dismiss the proceedings.

In addition to all of the foregoing statutory provisions making it perfectly clear that the order of confirmation is not only a preliminary step but is one that precedes by at least two steps what subsection (f) ordains as "the final

decree" we call this Court's attention to an express reservation in the order of confirmation in the present proceeding in the following language:

> "The Court retains full jurisdiction of this proceeding and of all parties in interest for the purpose of entering such other and further orders as may be appropriate."

In connection with this reservation of jurisdiction reference should be made to Sections Q and R of the Plan confirmed by the order of November 29, 1944, which Sections leave open for further judicial determination the method of discharge of the Debtor and the disposition of the Debtor's property to be made in advance of the final decree provided for in subsection (f). Until the Debtor is discharged the Court retains full, complete and exclusive jurisdiction under and pursuant to subsection (a) as well as the express reservation set out above.

The argument is made that the words used in the specific definition of the order of confirmation which are found in subsection (f) support the inference that the order of confirmation is a final order. It ought to be clear that the ancient basic jurisdiction of the Bankruptcy Court and no part thereof should be held to yield to an inference—especially since the inference runs counter to the express provisions of the same subsection which defers entry of "the final decree" until the closing of the case.

In the hearing in the District Court great stress was laid upon the circumstance that the Order of November 29, 1944 had been affirmed by this Court under a writ of *certiorari* to the Circuit Court of Appeals. That would be of significance if what is asked in the Petition runs counter to this Court's decision and to the mandate thereunder. Plainly it does not. What this Court decided was that on the record before the District Court on November 29, 1944 it had properly confirmed the Plan. Such decision did not

deprive the District Court of the judicial authority and control over the proceeding it would have had if there had been no appeal to the Circuit Court of Appeals from the Order of confirmation and no writ of *certiorari* to review the decision of the Circuit Court of Appeals. This Court has not, however, left such a question open or at large. On the contrary, this Court's own mandate is that "further proceedings be had in said cause as according to right and justice ought to be had, the said writs of *certiorari* notwithstanding."

One of the cardinal rules of equity is the rule that equity abhors a forfeiture. Equity speaks as of the date of its decree and does what is right and just not as of the date of the trial or the hearing but as of the date of the final determination of the cause. It is therefore a deep-rooted doctrine that the Chancellor will not enter a final decree or make any final disposition of an equity proceeding within his jurisdiction if the effect of conditions which have supervened since the record closed would render such decree or disposition unfair and inequitable or result in an avoidable forfeiture.

Reference is here made to the following supporting authorities:

Randal vs. *Brown*, 2 How. 406, 423;
Milwaukee and Minnesota Railroad Company vs. *Soutter*, 2 Wall. 510;
Graffam vs. *Burgess*, 117 U. S. 180, 192;
Atchison, Topeka & Santa Fe Railway Company vs. *United States*, 284 U. S. 248;
Central Kentucky Natural Gas Company vs. *Railroad Commission*, 290 U. S. 264;
United Corporation vs. *Federal Trade Commission*, 110 Fed. (2d) 473.

In addition to these early cases, we invoke the decisions of this Court in the cases of *Ecker* vs. *Western Pacific Railroad Corporation and Others*, 318 U. S. 448; and *Group of*

nstitutional Investors vs. *Chicago, Milwaukee, St. Paul and Pacific Railroad Company*, 318 U. S. 523, and the opinion of Mr. Justice REED in the instant case.

The application of this basic equitable principle in proceedings under the reorganization provisions of the National Bankruptcy Act presents special problems.

In the case of *Interstate Commerce Commission* vs. *Jersey City*, 322 U. S. 503, Mr. Justice JACKSON makes it clear that there must be a change as distinguished by a mere fluctuation and that in an administrative proceeding it does not extend to changes incidental to the normal lag or gap between the closing of the record and the time that the administrative order is promulgated. In the present proceeding Mr. Justice REED in the Opinion released June 10, 1946 excludes changes which were envisaged. Obviously no general rule can be laid down for the determination of collateral questions of this character. They must be determined in the light of the facts and surrounding circumstances of each case. A more liberal rule would be indicated for a judicial proceeding where there is a direct taking of private property than for an administrative proceeding where the impact is indirect and the principle of *res adjudicata* is inapplicable. This distinction should be borne in mind in connection with the decisions of this Court which are asserted to limit the application of *Atchison, Topeka and Santa Fe Railway Company* vs. *United States* (284 U. S. 248) and *Central Kentucky Natural Gas Company* vs. *Railroad Commissioners*, 290 U. S. 264.*

So far as it is possible to develop a broad rule which never is to come into play except in unusual and unforeseen circumstances, we think the authorities cited above support the following generalization—

* *United States* vs. *Northern Pacific Railway Company*, 288 U. S. 490; *St. Joseph Stock Yards Company* vs. *United States*, 298 U. S. 38; *Baltimore and Ohio Railroad Company* vs. *United States*, 298 U. S. 349; *Interstate Commerce Commission* vs. *Jersey City*, 322 U. S. 503; *United States* vs. *Pierce Auto Freight Lines, Inc.*, 327 U. S. 515.

Whenever an economic change occurs which is "cataclysmic"; which renders unfair and unjust a determination theretofore fair and just; and which forfeits the property belonging to one party and irrevocably gives it to another party, unjustly enriching the one to the detriment of the other, the rule that equity speaks as of the date of its final determination of the cause should apply in full vigor to avert such a forfeiture.

That some change was considered when the earlier determination was made ought not to be enough to bar an application of the rule unless the change be one that was envisaged as within the range of reasonable and definite expectation. Equity does not develop limitations to stifle its own conscience.

B The Facts: Since the facts alleged in the Respondents' Petition were susceptible of proof notoriously available—much of it already having been developed by the Interstate Commerce Committee of the United States Senate—the Petitioners elected to contest the Petition solely on the questions of law raised by a motion to dismiss the Petition (Tr. fols. 13-15). The District Court denied the Petition on the two grounds stated above, (i) finality of the Order of confirmation and (ii) want of equity (Tr. fol. 16).

The Plan of Reorganization for the properties of the Respondents which eliminated 90% of the investment of the Debtor's General Mortgage Bonds; made no provision for $17,000,000. of Preferred Stock; and declared worthless all of the Debtor's Common Stock was certified to the District Court by the Interstate Commerce Commission on June 14, 1943 and was based upon a record formally closed on May 20, 1941 (Tr. fols. 4, 9, 12). The Plan was approved by the District Court by Order dated October 30, 1943 and was confirmed by the District Court on November 29, 1944 (Tr. fol. 5). The Petition of the Respondents asking that

.he proceeding be referred back to the Interstate Commerce Commission for a new non-forfeiture Plan was filed in the District Court on September 17, 1946 (Tr. fol. 12).

The elapsed time between the closing of the record and the filing of the Respondents' Petition was five years, three months and twenty-seven days. This period, far from reflecting a normal lag is of sufficient length alone to create a legal presumption of obsolence—a circumstance which is aggravated against the Petitioners in this case because much of the delay was due to the fact that they were quarreling among themselves over the division of the spoils. We think there would be something wrong with a system of jurisprudence which permitted confiscation on a grand scale to be put into effect on the basis of fact-findings of an administrative body five years, three months and twenty-seven days old without giving that administrative body a chance to review and correct its own findings and protect itself against such excoriating criticism as appears in the Report of the Senate Committee on Interstate Commerce on Senate Bill 1253—(Rep. No. 1170, Calendar No. 1190, Seventy-Ninth Congress, Second Session).

The Respondents, however, base their Petition upon economic changes which have progressively developed since the Plan of Reorganization was certified to the District Court and in a very large measure *since* the Order of confirmation entered November 29, 1944, namely:

(a) The decline in money rates to a level far below those prevailing when the Plan of Reorganization was certified in the District Court,

(b) The recent public offering by the Government and the purchase by private capital for private operation of .ne steel plant at Geneva, near Provo, Utah which had been constructed by the Government in the exigencies of the war

at a cost in excess of $200,000,000.—more than the value the Commission itself attributed to the entire Denver and Rio Grande Western Railroad System;

(c) A permanent elevation of the national income through intensified industrial activity involving for the indefinite future a greatly increased demand for railway transportation (Tr. fols. 5-7).

Each of these major economic changes isolated from the others and standing alone is of sufficient magnitude and impact as to require a new Plan of Reorganization for the Debtor in which it is given due recognition.

We shall discuss each briefly.

(i) Decline in Money Rates:

The Plan of Reorganization certified to the District Court on June 14, 1943, assumed that a Bond secured by a senior rail lien should yield 4% in order to be worth par. That that was true on May 20, 1941 when the record was closed in the Interstate Commerce Commission is not questioned. Money rates eased gradually between that date and the date of certification but there was no cataclysmic change until after the Plan was out of the Interstate Commerce Commission and in the Court. Then the change came with dramatic suddenness in 1944. At the end of that year Chicago and Northwestern Railway Company called in its 4% Bonds which had been outstanding only seven months and refinanced on a 3% basis. That is to say, by reason of the drastic change in the cost of money the corporate earning power of that property had been put at a level at least 25% below what it should have been with the result that the permissible over-all capitalization put at $430,000,000 was understated by at least $100,000,000. This refinancing was followed in rapid succession by a series of refinancings, of which the following are scheduled in the Respondents' Petition (Tr. fol. 9):

Name	Date of Refinancing	Interest rate of Old Issue	Interest rate of New Issue
Chicago, Burlington and Quincy R. R. Co.	Aug. 1-Dec. 1, 1944	4%-5%	3½% 1½% 3¾%
Chicago and Northwestern Railway Co.	Jan. 1, 1945	4%	3%
Pennsylvania Railroad Company	Jan. 1, 1945	4½%	3⅛%
Pere Marquette Railroad Co.	Mar. 1, 1945	4%-5%	3⅜%
Wabash Railroad Company	Feb. 1, 1945	4%	3¼%
Washington Terminal Co.	Feb. 1, 1945	3½%-4%	2⅝%
Erie Railroad Co.	Jan. 1, 1945	4%	3⅛%
Erie Railroad Co.	Mar. 15, 1945	3⅛%	2%
Reading Company	Apr. 1, 1945	4%-5%	3⅛%
New York Connecting R. R.	Oct. 1, 1945	3½%	2⅞%
Lehigh & New England R. R.	Nov. 1, 1945	4%	3%
Western Maryland Railway	Nov. 1, 1945	5½%	1¾%-3¼%
Pennsylvania, Ohio and Detroit R. R. Co.	Oct. 1, 1945	3¾%-4½%	2⅞%
Term. R. R. Ass'n of St. Louis	Oct. 1, 1945	3⅜%-4%	2⅞%

In connection with the definite and permanent change in the rate level for the hire of money and the use of capital the Respondents' Petition incorporates by reference certain Congressional documents including Report No. 1170 of the Senate Committee on Interstate Commerce which sets out an informative group of statistical tables under the caption "Changing Pattern of Debt in the United States" (Tr. fols. 9-11). These tables furnished by the Federal Reserve Board show that the radical reductions upon which the Respondents rely are not limited to fixed interest bearing debt but extended to income bonds, preferred stocks and all of the securities that enter into the capital structures of our American railways. The following is an excerpt from that Report:

> "In 1946, the coupon rates are dropping fast, even below the 1945 rates, so that bonds refunded in

the autumn of 1945 are being refunded to lower coupon rates in the first months of 1946. So rapid is the decline in interest rates that railroad refunding bonds created a few months ago are themselves being refunded even before their first interest coupons fall due.

One example is furnished by the Southern Pacific, which in February 1946 refunded on a 2⅞ percent-coupon basis bonds it created 5 months earlier bearing a 3¾ percent coupon rate, which themselves were issued to refund previously created bonds bearing a higher coupon rate.

The Union Pacific recently sold a large bond issue at an interest cost to it of approximately 2½ percent."

(Report No. 1170 of Senate Committee on Interstate Commerce, Calendar No. 1190, Seventy-Ninth Congress Second Session, pages 24-30.)

The statistics set forth in this report and furnished by the Federal Reserve Board are amazing. Their present significance is made clear by the following items of testimony given at the hearings on S 1253 in the Senate Committee on Interstate Commerce by Vice President Purcell of the Allegheny Corporation and Mr. Charles D. Mahaffie of the Interstate Commerce Commission:

By Mr. Purcell:

"The Chairman. Most of the roads that are out of bankruptcy have refunded their bonds at a lower interest rate.

Mr. Purcell. Yes; that is a curious thing, too. Mr. Chairman, if I might comment on that for just a moment, the criterion under section 77 which is most frequently used in determining maximum capitalization is earning power. But let us assume that one of these railroads came out with $50,000,000 4 percent mortgage bonds and a month later they refinance them at 3 percent. There would be a saving of half a million dollars a year.

The Chairman. Yes; that was done.

Mr. Purcell. Yes.

The Chairman. They paid a dividend of 20 percent after they came out.

Mr. Purcell. I think they were committed to do that, in view of the fact that the effective date of the plan was about 4 years prior. Perhaps that was not right in itself but under the contractual obligations the corporation had to do that.

But my point is, if you then save $500,000 a year, that, capitalized at 5 percent is $10,000,000, which would properly have been added to the total capitalization of the railroad; but, in view of the fact that the reorganization has been completed with $10,000,000 of potential capitalization (unauthorized) even under the procedure provided under section 77, it has been lost to somebody."

By Mr. Mahaffie:

"The changes in credit conditions have now made those 4 percent first mortgage bonds of the roads that are covered by section 20c such that they generally can be readily refunded when the property is back in solvent condition. If they can be refunded at, say, 3 percent, that of itself, as Mr. Purcell indicated, affords a basis for an increase in capitalization, because the total of the fixed charges is one of the important elements in fixing capitalization. That and other changed conditions in these cases I think probably should have consideration where they can be shown to have changed to an important extent. It was with that in mind that I said if you are convinced, as I think you might well be, that these changed conditions should be looked into and evaluated, you might like, by statute, to send the proceedings in which you find them back for further consideration."

(Hearings before Senate Committee on Interstate Commerce on S 1253, Consolidated Print, pages 500-501; 520.)

Here is a very clear unequivocal admission on the part of Mr. Charles D. Mahaffie of the Interstate Commerce Commission that the recent changes in the money rates

have undermined the reorganization plans formulated by the Commission on the premise that 4% was the ruling minimum rate. But neither Mr. Purcell nor Mr. Mahaffie emphasized the further factor that the reduction in the rates for the hire money and the use of capital requires in testing the fairness of the plans formulated in the earlier economy a corresponding reduction in the rate used in capitalizing not only the increased income but all of the estimated income used as the factor to determine maximum capitalization. The Respondents' Petition alleges and the Petitioners admit that a reduction averaging 1½% in interest and dividend rates for capital structures set up prior to November 29, 1944 would be necessary to conform them to present-day security markets; that a reduction of 1½% in the interest and dividend rates prescribed in the Plan for the Debtor certified June 14, 1943 would involve an annual saving of $1,539,051 and that the resultant additional income capitalized at 3½% alone would provide for additional securities in the amount of $43,974,000—more than enough to make whole the holders of the Debtor's General Mortgage Bonds who are asked to forfeit more than 90% of their investment (Tr. fols. 9-10).

If there be any present-day virility in the traditional rule that equity abhors a forfeiture this proceeding should be sent back to the Interstate Commerce Commission to give that distinguished body an opportunity to back up by prompt corrective administrative action the testimony which Mr. Mahaffie gave to the Interstate Commerce Committee of the United States Senate.

(6) The Permanent Establishment of the Geneva Steel Plant:

The Geneva Steel Plant is the largest and most modern steel plant in existence. It was constructed as a war facility at a cost greater than the value attributed by the Interstate Commerce Commission to all the Debtor's properties. The

existence of this great traffic producing industry was given no weight at all when the Interstate Commerce Commission estimated the Debtor's earning power because at that time the plant did not exist and could not have been envisaged. On November 29, 1944, when the District Court confirmed the Plan now alleged to be obsolete it was unknown whether the plant would be closed down and written off as an expense item of the War or whether it would be sold as surplus property (Tr. fols. 10-12).

As late as February 28, 1946 Mr. Wilson McCarthy, Co-Trustee under Section 77 of the Debtor's property, testified before the Senate Committee on Interstate Commerce:

> "Now we were not dilatory in getting these plants on our lines. I am not saying we were responsible for getting them at all; we were not but we worked hard to get them and we have worked very diligently to retain the Steel Plant that we have got at Pueblo (meaning Provo). What its future is is purely problematical. Maybe it will go on. Maybe it won't."
>
> (Hearings before Senate Committee on Interstate Commerce, Consolidated Print, pages 335-336.)

The Respondents allege in their Petition that after the Plan of Reorganization for the Debtor's properties had been confirmed by the Court the Government decided to offer the Plant for sale as surplus property and in the month of June 1946 the property was acquired by the United States Steel Corporation which is now in possession; that the over-all purchase price was $47,500,000 plus an undertaking on the part of the purchaser to expend a minimum of $18,600,000 to adapt the plant to the manufacture of steel products in addition to those for which it was originally constructed (Tr. fols. 10-12). Coming back to the wholesome principle that equity abhors a

forfeiture it would seem that the very least a court of equity could do to avert the shocking forfeitures implicit in the Plan of Reorganization certified to it in this proceeding on June 14, 1943, is to give the Interstate Commerce Commission an opportunity to study the tremendous traffic possibilities of this great midwestern steel plant. We go further than this. We submit that it is the responsibility of the Court in the true performance of its duties under Section 77 to require that the Interstate Commerce Commission as the responsible fact-finding body under that Section determine whether and if so to what extent the commercialization of this new industry will enhance the permanent earning power of the Debtor's properties and thereupon revise upwards for the relief of junior and equity interests the depressed capital structure predicated upon obsolete pre-war earning experience.

(iii) The Post-war National Economy: It is impossible to say with precision when the pre-war economy ended and the post-war economy began. The transition happened long after the Plan of Reorganization was developed in the Interstate Commerce Commission and long after it was certified to the District Court. The most recent manifestation of the new economy was the permanent rate increase granted rail carriers by the Interstate Commerce Commission in *Ex Parte* 162. It cannot be gainsaid that our rail transportation system is performing its great public functions in a new economic era. If the passing into this new era did not render the Plan of Reorganization dating back to the old era obsolete *per se* then, at the very least, the transition rendered it too undependable to be used as the basis for the forfeiture of private property without further confirmatory findings by the Interstate Commerce Commission.

The Interstate Commerce Commission has taken the view that the Courts have held that post-war peacetime

conditions are not now relevant. The Commission appears to think that the Courts have decided that the post-war peacetime conditions which it visualized cannot be permitted to yield to the actual conditions which have materialized and are now provable. (Citing Report of Interstate Commerce Commission, Finance Docket No. 10008, St. Louis-San Francisco Railway Company, December 4, 1946).

Although the Debtor in that proceeding was not heard it had filed Objections to the final authorization of securities provided for in the previously certified Plan. The Commission said:

> "Objections were filed with us by the debtor with request for a hearing but these either go to matters not involved in the application or are similar to objections filed with and overruled by the Court."

The Objections "overruled" by the Court were Objections made prior to any possibility of demonstration of the newly established peacetime norm of National income and Debtor's gross income. In the Objections previously made to the Court the Debtor was able only to point out provable factors which in its view justified the prophecy that the new demonstrable post-war peacetime level of Debtor's gross income would be substantially what has now materialized.

Similar Objections have been made in this case. The Courts have ruled that the prophecy of the Commission must be accepted in preference to the prophecy of the Debtor. That, however, was in the absence of a contrary demonstration then impossible. We now in our Petition to the District Court in this case present for consideration not a prophecy but a present materialized provable post-war peacetime level of Debtor's gross earnings with all of its implications.

In holding that the Commission prophecy prevails over Debtor's prophecy do the Courts mean that when the Com-

mission prophecy is shown to be false the false must yet prevail over the true?

If not there is yet a duty for the Interstate Commerce Commission to perform and it cannot completely perform it if it approaches its task with the mistaken view that its previous mistaken prophecy is judicially crystallized and cannot be supplemented by today's demonstrable facts. It has been made clear that the Court cannot substitute its view of the weight of fact for that of the Commission. It is idle to ask the *Court* to revamp the Plan to conform to new conditions. This does not mean that the Plan is quarantined from supplementary consideration by the administrative body which has sole responsibility for its factual foundation.

We ask the Court to permit the Commission to consider the newly developed picture. We ask appropriate Court action to the end that the Commission may not rest under the error that it must adhere to its prophecy in the face of its demonstrated falsity.

We alleged in our Petition to the District Court *inter alia*:

> "A permanent elevation of the National income through intensified industrial activity involving for the indefinite future a greatly increased demand for railway transportation" (Tr. fols. 5, 6).
>
> "The reasonably anticipated gross income of Debtor's property for the year 1946 will be far in excess of any pre-depression income and on the basis of any operating ratio heretofore experienced on the property there should be realized therefrom distributable income far in excess of any amount necessary for the service of Debtor's obligations" (Tr. fol. 12).

These allegations we were prepared to prove but creditors moved for a summary dismissal. It was granted. Debtor appealed.

No opportunity to present evidence was given. The allegations stand as true. Elementary fairness seems to require that holding; if not we should be permitted to prove the allegations.

The Debtor was met with the argument that the District Court should take judicial notice of the stock market value of the Debtor's securities and that Dow-Jones averages on rails are now lower than on June 10, 1946.

If Justice CARDOZO in *Ohio Bell Telephone Company* vs. *Public Utility Commission*, 301 U. S. 292, correctly stated the law judicial notice is not available to a party except to support his position on an issue of fact. The unchallenged facts of our Petition are not refutable by judicial notice.

If judicial notice is to be resorted to (against which we protest) we point out the unfairness of the use of stock market quotations or averages to test the value of the Debtor's property. The core of the issue is the value assumed by the Commission. It begs the question to try and justify the Plan by reference to stock market quotations which reflect the wrong valuation incorporated in the Plan. These quotations are so tainted by various extraordinary factors which are not found in the usual market for a stock that they lose all validity. The Commission knows this.

We do not wish to avoid any issue or fact presented by our petition. We would cheerfully face that issue before the Interstate Commerce Commission and we would be alert to prevent misguided judicial notice from dispossessing facts.

We print as Appendix A a table showing the relationship for the years 1926-1945 inclusive between National income, the gross income of Class I Railroads and the gross income of the Debtor's railroad. Debtor's gross income is taken from the record in this case. The other data is all a matter of public record and mathematical computation.

1946 National income is not shown. It was not possible to give a fair estimate of that figure until after mid-year when the estimates of all governmental bodies including the Interstate Commerce Commission have furnished authentication of an estimate exceeding $160,000,000,000.

The Debtor's railroad is a transportation channel as necessary as light and air to the economy it serves. The volume of the flow of business to it automatically adjusts to the volume in its territory. Management may increase or decrease the flow by its efficiency or lack of it. But the modification of the ratio by management is within marginal limits. A glance at Appendix A tells the story.

The war years may be excluded because they were anomalous. They demonstrated no change in the pre-existing norm. The Debtor was fortunate in receiving a large share of high tariff governmental traffic. This distorted the ratios.

The lowest percentage of National income received by the Debtor was thirty-three one thousandths of one per cent. in the year 1941. Applying that to the governmental estimates of 1946 National income shows a gross income for Debtor in 1946 of more than $45,000,000. The actual 1946 System Gross (November-December partially estimated) is $50,500,000.

Using the presumption that "what is will continue," the Commission used the gross for depression years (around $25,000,000) as the basis for its future estimates and modified that basis slightly upwards. Now using the same presumption the estimate of Debtor's expected normal gross income should be in excess of $50,000,000. This being on the basis of the old rates would be higher on the rates fixed in Docket No. 162. In its best pre-depression year the maximum gross income was $35,000,000.

But what of the estimated net? It cannot be assumed that the Commission was arbitrary in making its estimate

of net earnings for the Plan. It had an historical record of operating ratios at near 75%-80% (over-all cost of operation). For the year 1946, the wage raises and higher material costs have increased the operating costs. This condition is as temporary and foreign to the norm of operating costs as the war income was foreign to the norm of gross income. There is no justification for using any but the historical ratios. If adjustments and economies do not restore those ratios the Commission has the power and duty to restore them by rate adjustment. The demand for the Debtor's service is now so great that rates may be raised without a loss of business to cancel the raise. This was not true during the thin business of the depression.

These are the matters which establish the *prima facie* case we wish to present to the Commission. They involve a status that has materialized and is provable. The Commission will be considering a railroad with $50,000,000 or more gross income and will have to consider new costs and the possibility of relief from present high costs by rate action or otherwise. At the time the Commission was formulating the Plan Debtor was treated as a railroad with a normal $25,000,000 annual gross with no possibility of increasing it by Commission action and no prospective favorable changes in operating costs.

The two contrasting problems are wholly different. The result must be different unless a new rationale is found to belittle the drastic improvement in Debtor's status. The right to be heard by the Commission is no clearer expressed than in *Atchison, Topeka & Santa Fe Railway Company* vs. *United States*, 284 U. S. 248, and *Central Kentucky Natural Gas Company* vs. *Railroad Commission*, 290 U. S. 264. The judiciary should not *frustrate* the Commission in the performance of its duty by denying the Debtor access to it. *'Alkali' Export Association* vs. *U. S.*, 325 U. S. 196.

C The Scope of the Decision of This Court Rendered June 10, 1946:

The decision of this Court rendered June 10, 1946 was upon a writ of *certiorari* to the Circuit Court of Appeals which had held that the General Mortgage veto of the Plan was effective to require its reference back to the Interstate Commerce Commission and ordered it so referred without prejudice. In an effort to contribute to a comprehensive consideration of the whole case the Debtor asked this Court for a writ of *certiorari*. A similar petition was filed by the Missouri Pacific Railroad Company, a stockholder. These petitions were not granted. Following the decision rendered June 10, 1946 a motion for rehearing afterwards supplemented was filed by the Debtor which was denied by this Court. A similar petition filed by City Bank Farmers Trust Company was also denied. The only question decided by this Court was that the General Mortgage veto was not effective and that the Plan of Reorganization on the record before it had been properly approved by the District Court.

At every stage of this proceeding through the appellate Courts and in the original and supplemental Petitions for Rehearing filed in this Court following the decision rendered June 10, 1946 the Respondents have asked that judicial notice be taken of the changes in economic conditions which underlie their Petition filed in the District Court on September 17, 1946. The Petitioners now urge that the failure of the Courts to grant relief was an adverse adjudication. We do not think this is a fair interpretation of this Court's opinion. Nor do we feel that the Respondents' zeal should be thus penalized. On the contrary we submit that the opinion shows an intent to leave open all questions as to the legal and practical effect of these significant economic changes; and this interpretation is supported by the opinion of Mr. Justice Reed rendered August 6, 1946 in the proceedings for the reorganization of the Equitable Office Building Corporation in which he says that very thing.

Since the scope of this Court's decision is peculiarly within the knowledge of this Court itself we feel that lengthy discussion is hardly appropriate but we shall deal with it briefly in connection with our:

Answer to Petitioners' Arguments

Almost all of the Petitioners' arguments are technical and opportunist. They seek to hold what they have regardless of the rugged rules of right and justice.

They say that the Respondents' Petition being one for a Rehearing is directed to the Court's discretion and is not appealable; that the order of confirmation is a final determination which cannot be set aside; and that the merits of the Petition were decided adversely by this Court in its decision of June 10, 1946, leaving the District Court without power to avert the forfeiture they concede to be imminent.

At the outset we have challenged their assertion to which the District Court seems to have yielded that the Respondents' Petition is a "Petition for Rehearing."

The Petition is one supplemental in nature based upon changed economic conditions filed to protect property rights from forfeiture and was filed as of right under authority of decisions of this Court of which *Milwaukee and Minnesota Railroad Company* vs. *Soutter* (2 Wall. 510, 522) and *Atchison, Topeka and Santa Fe Railway Company* vs. *United States,* (284 U. S. 248) are typical.

The case first cited is in principle indistinguishable. The Railroad Company had offered to show that as a consequence of changes occurring during the progress of the receivership it had regained its solvency and could and would liquidate its debts if the receiver were discharged. The Court denied this relief and the Railroad Company appealed to this Court, which reversed the Circuit Court. In this case Mr. Justice MILLER, after referring to various

questions determined in the course of a receivership which had been protracted, said:

> "But when those questions had been passed upon by the Circuit Court, and by this court also on appeal, and the amount of the debt definitely fixed by this court, the right of the defendant to pay that sum, and have a restoration of his property by discharge of the receiver, is clear, and does not depend on the discretion of the Circuit Court. It is a right which the party can claim; and if he shows himself entitled to it on the facts in the record; there is no discretion in the court to withhold it. A refusal is error—judicial error—which this court is bound to correct when the matter, as in this instance, is fairly before it."

In the present proceeding the Respondents allege and the Petitioners admit that as a consequence of cataclysmic economic changes it has regained its solvency at least to the extent that it can make all of its creditors whole.

Under these two decisions of this Court, the Circuit Court in the case first cited and the Interstate Commerce Commission in the other were held to have no discretion to deny relief such as the Respondents here seek and the denial was held to be a judicial error which the appellate Court is bound to correct.

Without reference to any facts other than the decline in interest and money rates the Petition offers the equity court an opportunity to avert a forfeiture of forty million dollars ($40,000,000) of junior debt which is wiped out under an unexecuted Plan based upon a record closed 5 years, 3 months and 27 days. We submit that if the District Court had any discretion (which it did not) the discretion was here abused to a point constituting patent judicial error. It is proper to point out, however, that the District Court did not attempt or purport to exercise discretion but denied the Petition as the consequence of its own determination of the justiciable legal questions which we have already discussed.

We do not think it would be helpful to discuss further whether the order of confirmation is a final decree. Even if it were a final decree (which the authorities already cited and subsections (a), (f) and (g) of Section 77 and General Order XLIX of this Court show it is not) it is an order or decree over which the District Court still exercises judicial control and may rectify in furtherance of right and justice within the letter and spirit of the mandate of this Court.

The Petitioners insist that the Opinion of this Court released June 10, 1946 foreclosed and withheld from the District Court the power to consider as a basis for corrective action the changed economic conditions set forth and alleged in the Respondents' Petition.

The Petitioners rely upon the following statements in this Court's opinion:

> "We note also the contention that the possibility of a National income much higher and interest rates much lower than before World War II should affect valuations based on prospective earnings. Those factors, we think, were before the Commission when it made its earnings estimate." (90 L. Ed. 1145.)
>
> "Nothing these respondents have called to our attention indicates any improvement in economic conditions or prospects in July 1944 or any date since even June 1943, the date of the approval of the plan which would justify a treatment different from that accorded the claimants in 1943." (90 L. Ed. 1154.)

The Respondents admit that the view thus expressed although falling far short of an adjudication that would put "closure" on the District Court was to them a disappointment raising in the mind of counsel a misgiving as to the adequacy of their own presentation. They easily understand, however, why this Court in the earlier months of 1946 would be hesitant to take judicial notice of a new and vastly improved economy when unrest was abroad

in the land, when strikes were in effect or threatened and imminent in all of our basic industries and when great wage increases already had granted in the railway industry and made retroactive to January 1, 1946 with little if any assurance that the Interstate Commerce Commission would approve increased rates sufficient to bridge the gap between prosperity and disaster. That this thought was dominant in the mind of this Court is brought directly into focus by foot-note No. 29 to the opinion of Mr. Justice REED.

This Court hesitated to send this proceeding back to the Interstate Commerce Commission for a new Plan without giving the proponents of the pending Plan an opportunity to present *factually* their view of the new economy. Accordingly this Court sent the proceeding back to the District Court for such further proceeding "as according to right and justice and the law of the United States ought to be had." Instead of meeting the issue by factual inquiry the Petitioners elected to rely upon the technical defenses we have already considered and discussed.

Enough in condemnation of what has occurred under Section 77 has been said in the Senate through the Reports of its Interstate Commerce Committee and in the House of Representatives by the Reports of its Judiciary Committee and by the President of the United States in Memorandum of Disapproval of the Wheeler-Reed Bill to invite an argument approaching closer the precepts of elemental justice.

Since it is our belief that the *writ of certiorari* was issued for the purpose of crystallizing the principles to apply in Section 77 proceedings where injustice may be done as the result of unenvisaged economic changes we are addressing ourselves to this problem in the hope of aiding a constructive solution.

It is to be noted that an ordinary equity case differs from a Section 77 proceeding in an important aspect; in

the equity case the Court is the judge of both the law and the facts whereas in a Section 77 proceeding the Court is "*brigaded*" with the Interstate Commerce Commission whose factual findings if reached by application of proper standards and not arbitrarily are conclusive.

After the Interstate Commerce Commission has made its findings and certified a Plan of Reorganization to the District Court its function has ended unless and until the proceeding is referred back to it by the Court which ordinarily only happens when the Plan is disapproved by the District Court or rejected by creditors. There is no express authority granted by Section 77 to the Court to refer the proceeding back to the Commission after a Plan has been approved or confirmed except such as is inherent in the provision of subsection (a) which declares that the Court shall have exclusive jurisdiction and control of the debtor and with all the powers of the judge in an equity receivership not inconsistent with Section 77. That the District Court was intended to have power to refer the proceeding back to the Interstate Commerce Commission for a special purpose is clear from the provision of subsection (g) which speaks of "the recommendation of the Commission" and we think this view is supported by the opinion of this Court in *Group of Institutional Investors* vs. *Chicago, Milwaukee, St. Paul and Pacific Railroad Company*, 318 U. S. 523—Opinion of Justice DOUGLAS, page 542.

In an equity receivership proceeding it would be for the Court to say as judge of both law and fact whether economic changes required a final decree still within its control to be set aside; but that cannot be true of the judge in Section 77 proceeding where the Court is "*brigaded*" with the Interstate Commerce Commission and the latter alone has power to determine the facts. Since subsection (a) expressly provides that the jurisdiction reserved to the Court shall be exercised consistently with Section 77 the residual jurisdiction in cases involving changed economic conditions

would be to determine the existence or non-existence of a *prima facie* case. Whenever such a case is alleged the District Court (if there is an issue of fact) takes evidence limited to that single question. On a reference back to the Interstate Commerce Commission it will be the body to determine the ultimate factual issue and again its factual finding if reached by application of proper standards and not arbitrarily will be conclusive. Of course in its determination of the existence or non-existence of a *prima facie* case the Bankruptcy Court exercises a high judicial function and its decision is reviewable under Section 24a of the National Bankruptcy Act (11 U. S. C. A. 47a). It is for this Court to say what principles should govern the District Court in the exercise of this high judicial function; and here again we come back to the basic concept of justice which would resolve all doubts in favor of revised findings that would avoid a forfeiture.

To summarize the whole argument: we submit that economic changes of vast significance are alleged in the Petitions and are susceptible of proof and as a consequence of these economic changes it is possible—we think probable—that if afforded an opportunity to do so the Interstate Commerce Commission would reappraise the Debtor's earning power on a basis that would permit a sound capitalization large enough to avert some if not all of the tragic forfeitures required by the Plan certified June 14, 1943.

We think that the Interstate Commerce Commission would be grateful for an opportunity to take that humane course for the following reasons:

(1) Commissioner Charles D. Mahaffie so testified before the Senate Committee on Interstate Commerce (Senate Hearings on S 1253, pp. 518; 520; 521).

(2) The Securities and Exchange Commission has taken a strong position against an avoidable forfeiture of equities (Brief in Nos. 609, 610, 612, October Term, 1946).

(3) Congress by its passage of the Wheeler-Reed Bill has taken a definite position that avoidable forfeitures under pending Plans are contrary to the intent of Section 77 (S 1253, Seventy-Ninth Congress).

(4) The President in his Memorandum of Disapproval of the Wheeler-Reed Bill said: "By withholding my signature to this Bill I do not intend to indicate that I favor the pending reorganization plans. I am in agreement with those objectives of the bill which prevent undesirable control of the railroads, either immediately or within a few years, and which prevent forfeitures of securities" (White House Memorandum dated August 13, 1946).

For the foregoing reasons we submit that the stay order was justified in order to hold the *status quo* while vital justiciable questions were awaiting appellate decision pursuant to a lawful appeal; and that the answer to these questions should award the Debtor and the General Mortgage Creditors the right to have the new economic order laid before and considered by the Interstate Commerce Commission to the end that alterations justifiable in the sight of that Commission may be made. We are confident that the Commission action supplemented by the cooperation of the Bankruptcy Court will accomplish most of the salutary objectives of Senate Bill 1253.

Respectfully submitted,

Dated, January 3, 1947.

WILLIAM V. HODGES,
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Denver 2, Colorado,

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New York 5, N. Y.

Attorneys for The Denver and Rio Grande Western Railroad Company, et al., Respondents.

[APPENDIX FOLLOWS]

APPENDIX A

TREND OF D&RGW AND CLASS I RAILROADS OPERATING REVENUES COMPARED TREND OF U. S. NATIONAL INCOME 1926—1945

Year	U. S. National Income(1) (millions)	CLASS I RAILROADS Gross Op. Revenue(2) (millions)	CLASS I RAILROADS Gross Op. Revenue(2) Percent of National Income	D&RGW Gross Op. Revenue(3) (millions)	D&RGW Gross Op. Revenue(3) Percent of National Income	D&RGW Gross Op. Revenue(3) Percent of Class I RRs
45	$161,000	$8,902	5.529%	$74.8	0.046%	0.840%
44	160,700	9,437	5.872	70.3	0.044	0.745
43	147,900	9,055	6.122	70.2	0.047	0.775
42	121,600	7,466	6.140	54.5	0.045	0.730
41	96,900	5,347	5.518	31.6	0.033	0.591
40	77,600	4,297	5.537	26.2	0.034	0.610
39	70,800	3,995	5.643	25.1	0.035	0.628
38	64,200	3,565	5.553	23.4	0.036	0.656
37	71,500	4,166	5.827	26.8	0.037	0.643
36	64,900	4,053	6.245	25.6	0.039	0.632
35	55,700	3,452	6.197	20.9	0.038	0.605
34	49,500	3,272	6.610	19.2	0.039	0.587
33	42,300	3,095	7.317	17.1	0.041	0.553
32	40,000	3,127	7.818	17.6	0.044	0.563
31	54,500	4,188	7.684	23.5	0.043	0.561
30	68,900	5,281	7.665	29.7	0.043	0.562
29	83,300	6,280	7.539	34.8	0.042	0.554
28	80,200	6,112	7.621	33.2	0.041	0.543
27	76,400	6,136	8.031	33.1	0.043	0.539
26	76,900	6,383	8.300	34.0	0.044	0.533

National Income: The earnings of the labor and the capital employed in all economic enterprises, both public and private, throughout the nation—including the pay of the Armed Forces. Department of Commerce—*Survey of Current Business.*

Class I Railways: carriers with annual operating revenues above $1,000,000 but not including switching and terminal companies. I. C. C. Statistics.

D&RGW RR Annual Reports.

Research & Statistics
October 7, 1946

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Nos. 690, 63 Misc.

In the Supreme Court of the United States

OCTOBER TERM, 1946

INSURANCE GROUP COMMITTEE, REORGANIZATION COMMITTEE, GUARANTY TRUST COMPANY OF NEW YORK, TRUSTEE, CENTRAL HANOVER BANK AND TRUST COMPANY, TRUSTEE, UNITED STATES TRUST COMPANY OF NEW YORK, TRUSTEE, AND THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, TRUSTEE, PETITIONERS

v.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, ET AL., RESPONDENTS

ON PETITIONS FOR WRITS OF MANDAMUS AND PROHIBITION AND A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE 10TH CIRCUIT

MEMORANDUM OF RECONSTRUCTION FINANCE CORPORATION

In the Supreme Court of the United States

OCTOBER TERM, 1946

Nos. 690, 63 Misc.

INSURANCE GROUP COMMITTEE, REORGANIZATION COMMITTEE, GUARANTY TRUST COMPANY OF NEW YORK, TRUSTEE, CENTRAL HANOVER BANK AND TRUST COMPANY, TRUSTEE, UNITED STATES TRUST COMPANY OF NEW YORK, TRUSTEE, AND THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, TRUSTEE, PETITIONERS

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MEMORANDUM OF RECONSTRUCTION FINANCE CORPORATION

In view of the facts that (a) the Reconstruction Finance Corporation (hereinafter referred to as the RFC) participated in the proceeding before this Court decided in *Reconstruction Finance Cor-*

poration, et al., v. *The Denver and Rio Grande Western Railroad Company, et al.*, 1945 Term, Nos. 278–282, decided June 10, 1946, and (b) the RFC is a large creditor of The Denver and Rio Grande Western Railroad Company, the RFC respectfully submits this Memorandum in order to prevent any possible misunderstanding of its position with respect to the petitions filed by the above mentioned petitioners.

Because of the action of the Congress last Summer in passing the Bill known as S. 1253 and the reasoning of the President's Memorandum of Disapproval, dated August 13, 1946, both of which indicated disapproval of certain features of railroad reorganizations approved pursuant to the provisions of Section 77 of the Bankruptcy Act, which is the existing law, the RFC, as an agency of the United States created and existing by virtue of Congressional enactment, is not taking any position as to whether the petitions should be granted.

This does not mean that there has been any change in the position of the RFC with respect to the treatment for its claim provided in the plan of reorganization approved by the Interstate Commerce Commission on June 14, 1943, and supported by the RFC in the proceeding decided by this Court in *Reconstruction Finance Corporation, et al.*, v. *The Denver and Rio Grande Western Railroad Company, et al., supra.*

Attention is called to the fact that the plan provides that, in the event of the consolidation of The Denver and Salt Lake Railway Company and The Denver and Salt Lake Western Railroad Company with The Denver and Rio Grande Western Railroad Company, the RFC is to receive for its claim substantially different treatment from that which it would receive if such consolidation should not be effected. This is shown by section J of the plan which is set forth in the Appendix. The RFC has recently received advice that the holders of 90% of the outstanding Income Bonds of The Denver and Salt Lake Railway Company have voted for the modification of the terms of such Bonds which by section B of the plan has been made a condition precedent to the consolidation, and therefore the way has been paved for the consolidation. Accordingly, if the plan is consummated, the RFC will receive treatment for its claim on the alternative basis which it strongly prefers.

Respectfully submitted.

GEORGE T. WASHINGTON,
Acting Solicitor General.
JOHN D. GOODLOE,
General Counsel,
W. MEADE FLETCHER,
Chief Railroad Counsel,
Reconstruction Finance Corporation.

Dated November 15, 1946.

APPENDIX

Extract from the plan of reorganization of The Denver and Rio Grande Western Railroad Company approved by the Interstate Commerce Commission on June 14, 1943, and subsequently approved and confirmed by the United States District Court for the District of Colorado:

J. In the event that consolidation of the Salt Lake properties is to be effected as provided herein, the Reconstruction Finance Corporation shall receive, in payment of the debtor's and secondary debtor's notes to it, with accrued interest to December 31, 1942, $5,200,000 of new first-mortgage bonds and $8,700,605 of new income bonds plus the amount of the rental or other use and occupation claim of the Salt Lake Western trustee against the principal debtor's trustees which may be allowed by the court. Upon receipt of such new securities, the Reconstruction Finance Corporation shall deliver to the reorganization committee all the securities now held under pledge.

Nothing contained herein shall be construed as limiting in any manner affecting the right of the Finance Corporation to apply, in its discretion, the income on and the proceeds of the collateral held by it to or toward the payment of the principal or interest, or both, to or upon its claim against the debtor prior to the consummation of the reorganization.

In the event consolidation of the Salt Lake is not to be effected as herein provided,

the claim of the Reconstruction Finance Corporation shall be provided for as follows: For the $1,445,000 of Denver & Rio Grande Railroad Company consolidated-mortgage 4-percent bonds, $10,000 of Rio Grande Western Railway Company first trust 4-percent bonds, $1,395,000 of the Rio Grande Western Railway Company consolidated-mortgage 4-percent bonds, and $4,385,000 of the debtor's refunding and improvement mortgage 5-percent bonds, pledged as part security for the loans, the Reconstruction Finance Corporation shall be entitled to receive $1,566,846 of new first-mortgage bonds, $1,388,150 of new income bonds, $3,181,757 of new preferred stock and $3,861,910 of new common stock. These new securities, together with the $1,266,000 of Denver & Salt Lake income bonds, 500 shares of Goshen Valley stock, $1,777,000 of Rio Grande Southern first-mortgage bonds, 73,710 shares of Denver-Colorado Springs-Pueblo Motorway stock, 2,262 shares of Rio Grande Motorway stock, 45,889 shares of Denver & Salt Lake stock, and 36,310 shares of Salt Lake Western stock, now held in pledge, shall be deposited under an escrow agreement with a bank or trust company designated by the court, and escrow receipts therefor shall be issued to the Reconstruction Finance Corporation. The agreement shall be for a term of 6 years, and shall provide that the escrow agent (1) shall, at the request of the Reconstruction Finance Corporation, sell all or any part of the deposited securities at such price or prices as may be stated in the request, subject in the case of the sale of the stock of the Denver & Salt Lake, and of the Denver & Salt Lake Western, to any-

one other than the new company, to the approval of this Commission both as to the sale and as to the price to be paid, and (2) shall impound any or all receipts from the deposited securities, whether from sale, dividends, or interest, and make payments of same promptly to the Reconstruction Finance Corporation which shall agree to credit such receipts first against the interest accrued on the claim of $13,900,605 from January 1, 1943, to date at the rate of 4 percent per annum, and further agree to apply any funds received in excess of such interest requirement to reduction of the principal of the claim; *provided, however,* (1) that the new company shall have the right to purchase at any time all of the stock of the Salt Lake, or of the Salt Lake Western, which the Reconstruction Finance Corporation shall have requested the escrow agent to sell, at the price or prices stated in such request; (2) that if, prior to the expiration of the escrow agreement, the total sum paid through the foregoing means to the Reconstruction Finance Corporation shal equal the total amount due on the claim with accrued interest, the securities remaining in the hands of the escrow agent, together with any cash on hand after settlement of the said debt, shall forthwith be turned over to the new company; and (3) that, if at the expiration of the escrow agreement, the claim of the Reconstruction Finance Corporation shall not have been discharged in full, all the securities remaining on deposit, together with any cash balance, shall be turned over to the Reconstruction Finance Corporation in final settlement of its claim, subject, however, to the right of the new company, prior to such transfer,

to acquire all of such securities by payment of the balance then due on the Reconstruction Finance Corporation claim, including interest.

It shall be provided that the Reconstruction Finance Corporation shall be bound by the terms of any sale or sales to which it has consented and which have been approved by this Commission. During the life of the escrow agreement, the Reconstruction Finance Corporation shall have the right to receive notice of all meetings of the holders of stocks under deposit and to direct the escrow agent as to the manner in which stocks represented by the escrow receipts shall be voted at such meetings. In the absence of such directions, the deposited stocks shall be voted in such manner as the escrow agent may determine. The reasonable compensation and expenses of the escrow agent shall be paid by the new company.

The money value of any award for the rental or other use and occupation claim of the Salt Lake Western trustee against the principal debtor's trustees, as allowed by the court, shall be paid over to the Reconstruction Finance Corporation and the amount of the claim, or of the face amount of any note evidencing the indebtedness, correspondingly reduced without otherwise affecting the foregoing provisions with respect to the discharge of the claim where consolidation is not to be carried out.

U. S. GOVERNMENT PRINTING OFFICE: 1943

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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 690

INSURANCE GROUP COMMITTEE, REORGANIZATION COMMITTEE, GUARANTY TRUST COMPANY OF NEW YORK, Trustee, CENTRAL HANOVER BANK AND TRUST COMPANY, Trustee, UNITED STATES TRUST COMPANY OF NEW YORK, Trustee, and THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Trustee,

Petitioners,

vs.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, *et al.*,

Respondents.

PETITION FOR REHEARING PURSUANT TO RULE 33 OF THE RULES OF THE SUPREME COURT

WILLIAM V. HOGGES,
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Attorneys for The Denver and Rio Grande Western Railroad Company, et al., Respondents.

IN THE

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THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, *et al.*,

Respondents.

PETITION FOR REHEARING PURSUANT TO RULE 33 OF THE RULES OF THE SUPREME COURT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Respondents ask a Rehearing under both the writ of *certiorari* to the Circuit Court of Appeals and their Petition for an Order enlarging the time for the issue as of course of the Mandate consequent upon this Court's decision of February 3, 1947 on the *writ of certiorari.*

As to the Petition for enlargement of time the Respondents respectfully suggest that this Court may not have appreciated the importance of a *liaison* between the Judi-

ciary and the other divisions of Government under the Constitution in connection with pending proceedings under Section 77 of the National Bankruptcy Act.

The scheme of our Government is the lodgment of all legislative authority in the Congress, subject only to the restricted veto authority granted to the President, and the assignment to the Judiciary of the function to interpret when Congress has failed to speak in clear, unambiguous language. If the Judiciary goes further than this there is an encroachment by it upon the legislative field which the Constitution does not intend it to enter.

In cases where the Judiciary finds the Congressional expression to be obscure and of doubtful import then in the exercise of impeccable constitutional authority the Judiciary may and should place upon the Congressional enactment what it believes to be an interpretation truly reflecting the intent of Congress. If, however, after this judicial function has been performed Congress promptly makes clear (as it has done in this case) that the true intent was essentially different from what has been attributed to it and has revealed a purpose to enact corrective legislation the amenities would seem to require a *liaison* between the Judiciary and Congress which for at least a reasonable time would avoid forfeitures and changes in property rights under final judgments or decrees which do not truly reflect the legislative intent upon which they purport to rest.

Unless there is such a *liaison* the public may justly complain that our Government is not working as it was intended to work under the Constitution. The Respondents accordingly respectfully ask this Court to reconsider its rejection of their Motion for enlarged time for the issue of the mandate for two reasons: First, that Congress may be given a reasonable opportunity to correct what in one view is its own mistake and in another view is this Court's mistake; and second, that this Court may itself reserve further time

in this strange but critical emergency to reconsider its own decision rendered February 3, 1947 which the Respondents respectfully urge is wrong and should be set aside for impelling reasons of which they specify the following;

(1) Frustration of Interstate Commerce Commission:

The Respondents respectfully urge that refusal of this Court to refer this proceeding back to the Interstate Commerce Commission to consider and evaluate the tremendous economic changes which have occurred in the period between May 20, 1941 and September 17, 1946 is a frustration of the authority of the Interstate Commerce Commission, an agency of Congress, and to that extent is an encroachment upon its legislative authority under the Constitution. In its earlier interpretation of Section 77 of the National Bankruptcy Act this Court has held that the Interstate Commerce Commission is the exclusive judge of everything pertaining to property values so long as it conforms its determination to legal standards and does not act arbitrarily. This, it is true, is one of the focal points to which Congressional criticism of this Court's interpretation has been directed but until legislative change it is the authoritative interpretation of Section 77 to which the Judiciary is obliged to adhere. This Court in its opinion of February 3, 1947 says in substance that the Respondents have failed to allege or show an economic change of such magnitude as to require review by the Interstate Commerce Commission of its factual findings based on a record closed May 20, 1941. It seems impossible to reconcile this conclusion with an adequate understanding of the facts of record. On the change in interest rates alone the Respondents allege and the Petitioners admit that there are interest savings *now available* which if capitalized at prevailing rates will enable the Interstate Commerce Commission without changing any of its other findings to "provide additional securities in the amount of $43,974,000—more than enough to make whole the holders

of the Debtor's General Mortgage Bonds who under the obsolete Plan lose 90% of the investment." If therefore this Court fully understands what is alleged in the Respondents' Petition and is admitted to be true by the Petitioners it holds as a matter of law that the Interstate Commerce Commission should not be permitted to say as a matter of fact that it had *not* envisaged changes of that magnitude. The radical decline in the rates for the hire of money and the use of capital was only one of a number of vital economic changes in respect of which the Respondents asked a reference of the proceeding back to the Interstate Commerce Commission and in respect of which Mr. Charles D. Mahaffie, a member of the Finance Division of the Interstate Commerce Commission, had testified:

> "The changes in credit conditions have not made those 4% first mortgage bonds of the roads that are covered by Section 20 C such that they can be readily refunded when the property is back in a solvent condition * * *. That and other changed conditions in these cases I think probably should have consideration where they can be shown to have changed to an important extent."

To deny the Interstate Commerce Commission the right to give consideration to changed conditions which will enable it without departing from the principles underlying its earlier determination to protect up to $43,974,000 of capital which otherwise will be irrevocably forfeited is (as the Respondents respectfully submit) to frustrate the authority of the Interstate Commerce Commission.

(2) Extraordinary resort to judicial notice: The Respondents urge that their rights have been seriously impaired by this Court's undue extension of the doctrine of judicial notice. It is respectfully submitted that this Court may not consistently with the principle of due process displace the authority of the Interstate Commerce Commission as the exclusive judge of the facts and

deny the Respondents their right to prove facts upon which they rely by itself making conclusions of fact on the basis of judicial knowledge. Here the Court enters a field which by its own prior decisions it has assigned to the Interstate Commerce Commission as one belonging exclusively to it and a field in which the Interstate Commerce Commission is universally accorded expert knowledge. The particular facts implicit in the admitted allegation of the Petition filed by the Respondents and which they respectfully urge they are entitled to prove in detail before that fact finding body include—

(a) The prevailing rates to be paid for the hire of money and the use of capital in the railway industry.

(The refinancings listed in the Petition are merely indicative of a drastic change which the Commission should be permitted to evaluate in relation to Plans of Reorganizations it thought fair and equitable in what is acknowledged by it to be an obsolete economy.)

(b) The true earnings of the property during ten years of trusteeship.

(This would lead to an examination and elucidation of distorted accounts in consequence of which the true earnings may be found under-stated to a degree that alone accounts for a capital under-valuation up to $100,000,000.)

(c) The earning power of reinvested income not envisaged by the Interstate Commerce Commission.

(There was evidence before the District Court on confirmation which would be enlarged on a reference back to the Commission that the greatly enhanced earning power [which in 1946 was nearly 100% greater than the Commission's estimate for a peace-time year] was attributed in a very large

measure to reinvested income accruing *after* the Commission certified the Plan to the District Court.)

(d) The under-statement of income due to over-statement of operating expenses during trusteeship.

(There is a fertile field for inquiry by the expert organization of the Interstate Commerce Commission into the conversion and concealment of capital by inclusion of capital expenses in the cost of operation.)

(e) The minimizing of capitalizable income by the exclusion of income and excess profits, both federal and state.

(One of the points where the Courts may properly be subjected to criticism not easily answered for these Section 77 forfeitures is their insistence that war earnings cannot be used as a measure of normal earning power but that war-time taxes must be used in determining lack of earning power. By giving effect to this conspicuous inconsistency many hundreds of millions of capital prudently invested in the railway industry have been taken from the equity-owners and given to the Insurance Companies, one of which is said to be the largest financial institution in the history of the World with assets in excess of $6,000,000,000.)

(f) The allowance of excessive or inequitable interest accruals on senior debt.

(Since the Plan was certified by the Interstate Commerce Commission this Court has decided *Vanston Bondholders Protective Committee* v. *Greene*, 91 Law Ed. No. 3, which is deemed to modify the rigid rule as to contract interest asserted in *Consolidated Rock Products Company* v. *DuBois*, 312 U. S. 510. There may be a very critical question as to the right of the Bonds secured by lien on the lines west

of Grand Junction to accrue interest against the Bonds secured by the mortgage on the lines east of Grand Junction and against the General Mortgage which is all but 10% extinguished under the Plan formulated nearly six years ago when the Operating Revenues were half of what they are today.)

(g) The forefiture of property rights through or on the basis of judicial notice of stock market quotations.

(The Respondents cannot admit that this Court consistently with our legal traditions can forfeit their property rights by such a process. The Interstate Commerce Commission itself in *St. Louis Southwestern Railway Company Reorganization*, 252 I. C. C. 325, 326, has so held. There is no doubt that it would so hold in the present case if this Court will give it an opportunity to do so as asked in the Respondents' Petition filed September 17, 1946. It is a notorious fact that in many cases stocks sell for less than their value as reflected by free cash in bank and that private transactions are common at prices far above current stock market quotations. To deny the Respondents the right to prove the vagaries of the stock market is to deny them one of the essentials of due process—the right to be heard and to prove their case.)

(h) This Court says—"Earnings estimates are made with allowance for changing economic conditions. So are interest rates. All this is recognized by everyone, but the Commission has found no better way to determine the allocation of new securities among various classes of stockholders or creditors of a railroad with their different rights"—and it implies, if it does not expressly say, that the Commission made allowance for the changed economic conditions shown by the Respondents' Petition filed September 17, 1946.

(This conclusion, the Respondents submit, is contrary to the realities as revealed by the testimony of Commissioner Mahaffie before the Interstate Commerce Committee of the United States Senate. But, even if Mr. Mahaffie had not testified as he did, an analysis of the Petition will demonstrate that the Commission could not [unless arbitrarily] have given allowance for economic changes of such magnitude. Justice BRANDEIS in *Baltimore and Ohio Railway Company* vs. *United States* characterized the change from pre-depression to depression as "catastrophic." The change from depression to post-war economy is vastly greater than the change from pre-war economy to depression.)

(3) Recapitulation: This Court says: "To open a confirmed plan of railroad reorganization, assuming the power to do so, accepted after years of consideration requires a showing by allegation of injustice to the complaining debtor or junior creditors far stronger than any here made" and further says "that the record fails to show any sound basis for re-examination on account of changed circumstances between May 1941 and June 10, 1946."

It is to be noted that this Court reached the conclusion above stated on a record which showed the following facts:

(a) that the Plan of Reorganization based upon a new capital structure representing a capitalization of income estimated in a pre-war economy made no provision for $39,193,239 of General Mortgage debt, no provision for $16,445,600 of Preferred Stock and no provision for Common Stock;

(b) that this capital structure was based upon a capitalization of income alleged and shown to be at a rate 1½% above prevailing rates; and

(c) that estimated income was based upon Railway Operating Revenues of $25,000,000 whereas prevailing

Operating Revenues in the present day peace-time economy are $50,000,000 and these Revenues are projected into the future as far as 1949 by the Bureau of Transport Economics and Statistics.

We do not see how the significances of these basic economic facts can be brushed aside by reference to sporadic sales on a broker's board or how this Court consistently with what it has held as to the true function of the Interstate Commerce Commission under Section 77 can withhold from the Commission the privilege of itself saying what the new economy is and what in the new economy a fair and equitable Plan should be.

If the Commission agrees with this Court the delay will be trivial and no harm will have been done to any party in interest or to the public. If the Commission disagrees with this Court the Debtor's junior creditors and stockholders will retrieve some, if not all, of a legitimate investment which otherwise will be sacrificed.

The Respondents respectfully ask this Court to modify its decision of February 3, 1947 by giving the Interstate Commerce Commission the opportunity to determine these questions so manifestly within its exclusive province as established by the prior decisions of this Court.

Respectfully submitted,

Dated, February 20, 1947.

WILLIAM V. HODGES,
Equitable Building,
Denver 2, Colorado,

FRANK C. NICODEMUS, JR.,
44 Wall Street,
New York 5, N. Y.,

Attorneys for The Denver and Rio Grande Western Railroad Company, et al., Respondents.

[CERTIFICATE OF COUNSEL FOLLOWS]

Certificate of Counsel

I, FRANK C. NICODEMUS, JR., attorney and counsel herein for The Denver and Rio Grande Western Railroad Company, *et al.*, do hereby certify pursuant to Rule 33 that the foregoing Petition for Rehearing is presented in good faith and not for delay.

February 20, 1947.

FRANK C. NICODEMUS, JR.

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FILED
MAR 1 1947
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 690

INSURANCE GROUP COMMITTEE, REORGANIZATION COMMITTEE, GUARANTY TRUST COMPANY OF NEW YORK, Trustee, CENTRAL HANOVER BANK AND TRUST COMPANY, Trustee, UNITED STATES TRUST COMPANY OF NEW YORK, Trustee, and THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, Trustee,

Petitioners,

vs.

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, *et al.*,

Respondents.

Affidavit of Frank C. Nicodemus, Jr. in Support of Petition for Rehearing

State of New York,
County of New York, } ss.:

FRANK C. NICODEMUS, JR., being duly sworn, deposes and says:

That he is Counsel in this proceeding for the Respondents.

That the primary purpose of this Affidavit is to furnish this Court with the latest available information as to the progress of impending Congressional legislation intended to give protection against forfeitures or confiscation of

equities in this and other like proceedings which in view of prior decisions of this Court cannot be given without remedial legislation.

The Chicago Journal of Commerce in its issue of February 24, 1947 refers to a Report about to be released under Senate Resolution 65 which, it is stated, will lay the foundation for quick Congressional approval of legislation conforming to President Truman's views. A copy of this Report the release of which is expected momentarily will be filed in connection with this Affidavit.

From the information now available it is reasonable to assume that legislation will be passed by Congress and approved by the President very promptly in all probability within the additional time asked by the Respondents' Petition filed February 7, 1947 namely—35 days from the 25 day period prescribed by Rule 34.

At the present time there are pending in the District Courts proceedings for the reorganization of the following major rail carriers:

Central Railroad of New Jersey;
Chicago, Rock Island and Pacific Railroad Company;
Missouri Pacific Railroad Company;
New York, New Haven and Hartford Railroad Company;
St. Louis Southwestern Railway Company;
The Denver and Rio Grande Western Railroad Company.

There are others, some of lesser importance, but except the Central Railroad of New Jersey where reorganization has been delayed by tax litigation with which this Court is familiar Plans of Reorganization all of the same general nature and critical impact declaring worthless the stock equity and forfeiting a very large part (in the instant case

90%) of the junior secured debt are well advanced toward final consummation.

In the proceeding for the reorganization of the Chicago, Rock Island and Pacific Railway Company the Circuit Court of Appeals in the Seventh Circuit has recently reversed an order of the District Court refusing confirmation of a Plan and has ordered the proceeding remanded to the District Court with directions to confirm the Plan.

In the proceeding for the reorganization of the Missouri Pacific Railroad Company the Circuit Court of Appeals in the Eighth Circuit recently refused an application to refer the proceeding back to the Interstate Commerce Commission to give effect to a new Plan agreed upon by the parties.

In the proceeding for the reorganization of the New York, New Haven and Hartford Railroad Company the Circuit Court of Appeals for the Second Circuit recently affirmed by a divided Court an order of the District Court approving a Plan of Reorganization certified by the Interstate Commerce Commission by a Sixth Supplemental Report.

The proceeding for the reorganization of St. Louis Southwestern Railway Company is now before this Court on Petition of the Southern Pacific Company for a writ of *certiorari* to the Circuit Court of Appeals in the Eighth Circuit affirming an Order of the District Court approving a Plan of Reorganization certified March 9, 1942.

In the instant proceeding, as the Respondents are informed, a special machinery has been set up by the Reorganization Managers to be put instantly into motion if, and as soon as the Mandate under this Court's decision of February 3, 1947, reaches the District Court to bring about changed positions and to create legal complications which will make it difficult for the Court to accord the Respondents the benefit of remedial legislation; or in brief to effect *a fait accompli*.

While each of the proceedings listed above presents its individual problems all of them are fundamentally the same in one vital phase that is common to all: in each case the entire stock equity and a substantial part of the junior secured debt is forfeited under an appraisal or valuation which in the opinion of Congress based upon exhaustive study is obsolete and was given under an interpretation of Section 77 of the National Bankruptcy Act which Congress has said is contrary to the true intent of that Section.

Remedial legislation is imminent.

In this situation a very serious question arises which seems to be addressed more to the administrative than to the judicial authority of this Court. This question is: shall this Court with remedial legislation imminent allow one or more of the carriers listed above to be speeded through a reorganization that will put it beyond the protective arm of such legislation *solely* for the reason that its case is further advanced on the docket of the Court than other carriers otherwise identically situated?

Is not this Court as an integral part of our Constitutional Government in duty bound to exercise its own power so as to vindicate and enforce the principle of equal protection of the laws which the Constitution guarantees to all of its citizens in the same class?

Or to state the question from the other angle: Is the fact that a particular carrier happens to be the one nearest the precipice a valid reason why it should be pushed over rather than held there for relief which is known to be, or even hoped to be, imminent?

In further support of the Respondents' Petition for a Rehearing under the writ of *certiorari* there is a new factor also bringing into focus the administrative rather than the judicial function of this Court which seems to justify a reference of this proceeding back to the Interstate Commerce Commission for further consideration.

The Interstate Commerce Commission in its original Report dated July 11, 1939 provided that all Preferred and Common Stock of the reorganized Company should be placed in a ten-year voting trust. The Voting Trustees and the Reorganization Managers are the identical individuals and are to be in the saddle for ten years. Their first important official act was to go to Chicago, nearly 1,000 miles away from the property, for their Counsel who happens to be a former General Counsel of the Chicago, Burlington and Quincy Railroad Company. When the Wheeler-Reed Bill was pending in the Seventy-Ninth Congress which was prior to the enactment of the Federal Regulation of Lobbying Act the Chicago, Burlington and Quincy Railroad Company openly opposed that measure unless The Denver and Rio Grande Western Railroad Company was excluded. Although the Chicago, Burlington and Quincy Railroad Company is a strong and highly valued connection of The Denver and Rio Grande Western Railroad Company it has no known proprietary interest in the latter's property and is only interested as a connecting carrier serving the Denver gateway which is in competition with Colorado Springs served by the Chicago, Rock Island and Pacific Railway Company and with Pueblo which is served by the Missouri Pacific Railroad Company. The Reed Bill as passed by the House of Representatives contained a provision investing the Interstate Commerce Commission with plenary power and authority to require the maintenance and operation of the Respondents' properties without discrimination in favor of one route over any other route or in favor of one connecting carrier over any other connecting carrier. This provision was not acceptable to the Chicago, Burlington and Quincy Railroad Company which raises a question whether free and open competitive gateways maintained without discrimination is not what it fears and whether under the Plan of Reorganization the Reorganized Company will not for all practical purposes be delivered over to the Chicago, Burlington and Quincy Railroad Company with adequate power to dominate its Management but without responsibility either to the corporate security holders or to the public.

The Interstate Commerce Commission is the body best qualified to determine whether the recent intervention of the Chicago, Burlington and Quincy Railroad Company into the affairs of the Respondents does not require in the public interest a modification of the ten-year voting trust or its complete elimination. In my opinion based upon a familiarity with the property and its operations extending back over a long period of years the Plan of Reorganization ought not in any circumstance be made effective unless and until the Interstate Commerce Commission is given an opportunity to probe this new problem vital to the public interest and an opportunity to recast the voting trust so as to assure full and effective protection to the important competitive gateways at Colorado Springs and Pueblo. A reference of this proceeding back to the Interstate Commerce Commission for further consideration would enable it to make such a determination without affecting the Plan if it should determine that it is still fair and equitable and compatible with the public interest.

The Administrative Office of the United States Courts is also well qualified to determine for the information of this Court by an analysis of original data in the files of the Judiciary Committee of the House of Representatives whether a reference of this proceeding back to the Interstate Commerce Commission for reconsideration would not in the light of these new facts be an appropriate exercise of the administrative authority of this Court.

FRANK C. NICODEMUS, JR.

Subscribed and sworn to before me this
28th day of February, 1947.

HOWARD A. FISCHER
Notary Public in the State of New York
Residing in Kings County
Kings Co. Clk's No. 80, Reg. No. 91-F-8
Cert. filed in N. Y. Co. 176, Reg. No. 69-F-8
Commission expires March 30, 1948

SUPREME COURT OF THE UNITED STATES

No. 690.—October Term, 1946.

Insurance Group Committee, Reorganization Committee, Guaranty Trust Company of New York, Trustee, et al., Petitioners, v. The Denver and Rio Grande Western Railroad Company, et al.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

[February 3, 1947.]

Mr. Justice Reed delivered the opinion of the Court.

On November 29, 1944, the District Court for the District of Colorado confirmed a plan of reorganization for the debtor, the Denver & Rio Grande Western Railroad Co., 62 F. Supp. 384, notwithstanding the rejection of the plan by holders of the General Mortgage bonds pursuant to § 77 (e). Upon appeal the Circuit Court of Appeals reversed the order of confirmation. This Court granted certiorari, reversed the Circuit Court and affirmed the order of confirmation. — U. S. —. The debtor consistently opposed the plan throughout those proceedings. After the opinion of this Court was filed on June 10, 1946, the debtor petitioned for a rehearing which was denied October 28, 1946. At about the same time as that of filing its petition for rehearing, it moved in the District Court (September 17, 1946) for a re-examination of the plan in the light of circumstances which had changed since the Interstate Commerce Commission's hearings on the plan in May, 1941. 254 I. C. C. 6. The debtor specified three categories of changed conditions: "(a) The decline in money rates to a level far below the rates prevailing at these dates; (b) The recent public offering by the Government and purchase by private capital for private operation of the steel plant at Geneva, near Provo, Utah, which had been constructed by the Government in the

exigencies of the War at a cost in excess of $200,000,000; (c) A permanent elevation of the National income through intensified industrial activity involving for the indefinite future a greatly increased demand for railway transportation."

The debtor prayed that upon re-examination the District Court set aside its order of October 25, 1943, approving the plan, and its order of November 29, 1944, confirming the plan, and refer the proceeding back to the Interstate Commerce Commission for the formulation of a new plan. After a hearing on a motion to dismiss the debtor's petition but without the introduction of evidence, the District Court dismissed the petition on October 30, 1946, on the grounds that the order of confirmation determined the rights of participation and that the District Court did not now have power to reopen the proceedings. The District Court also held that the petition failed to state a case that justified reconsideration. The debtor filed notice of appeal and requested a stay of execution of the plan on the same day; the latter motion was denied by the District Court at that time. Thereupon the debtor docketed its appeal in the Circuit Court of Appeals and applied for an order staying execution of the plan until the appeal should be considered. This application of the debtor was granted on November 2, 1946, by an order of Judge Phillips staying proceedings in the District Court to consummate the plan. A petition for certiorari to the Circuit Court was filed in this Court under Judicial Code § 240 (a) which asked that we grant a writ of certiorari to the Circuit Court of Appeals, before judgment, and that the order of the District Court be affirmed in this Court. The grounds urged were that the action of the respondent was in violation of the mandate of this Court issued June 10, 1946, and that even if the mandate had not been violated the denial of the petition to reopen proceedings on the plan was not appealable because the petition for re-examination was in reality a petition for

rehearing. Further, petitioner urged that this Court take and decide the whole case because the claim of change of circumstances was repetitious of the same claim rejected by this Court in its June, 1946, decision and that no allegations were made sufficient to justify a re-examination of the plan on account of changes in circumstances since the June decision. Because of the importance of the questions raised to the efficient administration of railroad reorganizations under the Bankruptcy Act, we granted certiorari. —U. S. —.

We may assume, arguendo, that both this Court upon appeal from an order of confirmation in bankruptcy, and the bankruptcy court itself, after its order of confirmation has been affirmed on review (11 U. S. C. § 205 (f)), may take cognizance of subsequent changes in conditions and order a plan re-examined by the Interstate Commerce Commission. On that assumption, we are of the opinion that the debtor has failed to allege the existence of changed conditions since our decision of June 10, 1946, of a kind not "envisaged and considered by the Commission in its deliberations upon or explanations of the plan." Nos. 278–82, October Term, 1945, slip opinion, p. 18. We do not therefore think that re-examination would be justified in this case.

The conclusion in the foregoing paragraph removes the necessity of considering the question whether the respondent disregarded the effect of the judgment of this Court of June 10, 1946, which affirmed the orders of approval and confirmation of the plan. Likewise it disposes of any necessity to determine whether this petition in the District Court was in reality a request for a rehearing. Cf. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 247.

Upon the same assumption employed above, we ruled in our decision of June 10, 1946, slip opinion, *supra*, p. 27, that in this reorganization no changed circumstances, up to

that date, presented to us by the debtor or other respondents in that review justified a re-examination of the plan as confirmed. This ruling was binding upon the District Court and the Circuit Court of Appeals as to changed circumstances arising after the order of confirmation and prior to our decision. When matters are decided by an appellate court, its rulings, unless reversed by it or a superior court, bind the lower court. Thus a cause proceeds to final determination. While power rests in a federal court that passes an order or decision to change its position on a subsequent review in the same cause, orderly judicial action, except in unusual circumstances, requires it to refuse to permit the relitigation of matters or issues previously determined on a former review.[1]

The debtor's brief and the opinion of the Circuit Court of Appeals on the hearing of the review of the orders of approval and confirmation of the plan make clear that changed circumstances in the period between the Interstate Commerce Commission hearings in May, 1941, and our decision of June 10, 1946, of a like character with those now alleged, were relied upon by the debtor in its former effort to set aside the District Court's orders of approval and confirmation. The debtor argued on the former review, as it again argues, that the plan should not be confirmed because of the "radical lowering for the indefinite future of money rates." And it was emphasized at that time that capitalizing on these lower rates would permit the issuance of a greater volume of securities against earnings of the debtor, and consequently a larger allotment to presently dissatisfied creditors. Every example of railroad refinancing, listed in respondent's present brief to support by illustration the argument of falling interest rates, was listed in the brief on the last review for

[1] *Great Western Telegraph Co.* v. *Burnham*, 162 U. S. 339, 344; *King* v. *West Virginia*, 216 U. S. 92, 101; *Messenger* v. *Anderson*, 225 U. S. 436, 444; *Wichita Co.* v. *City Bank*, 306 U. S. 103, 106. Cf. *Chaffin* v. *Taylor*, 116 U. S. 567, 572.

the same purpose. The purpose was to set forth instances of the issue of railroad securities at interest rates definitely lower than those borne by the debtor's issues. The debtor in its brief of that time also argued the beneficial effects of the "permanent elevation of national income" upon the anticipated earnings of the debtor. Lastly, the debtor there pointed out that the "establishment and construction of the great Geneva steel plant was certain to be revolutionary in its contribution to the earning power of the debtor . . ." Although it did not then rely, as it does now, upon the purchase of that corporation by private capital, the argument, then as now, was that the prospective business from a great steel plant was a factor indicating higher earnings. The plant may or may not turn out to be strategically located for private low cost operation and distribution. The shift of ownership has only moderate significance.

In sum, the very kinds of changed circumstances which were argued here formerly as reasons for not approving and confirming the plan of reorganization were presented by the petition now under review to the District Court as reasons why that court should vacate its orders of approval and confirmation, and remand the plan to the Commission for reconsideration. The debtor argues that it only urged this Court to take judicial notice of the existence of these changed circumstances, and that our refusal to do so should not bar it from proving these changes in the District Court. Our holding was not based upon a conclusion that this Court could not take judicial notice of changes in economic conditions subsequent to approval by the Interstate Commerce Commission. We concluded that, even if weighed, the alleged changes were not of a kind which justified re-examination of the plan. Slip opinion, *supra*, p. 27.

The questions of interest rates and increased earnings from the Geneva steel plant were considered by the Commission and the District Court before the order of

confirmation. The approval of the plan by the Commission on June 14, 1943, appraised economic changes subsequent to the hearings. 254 I. C. C. 349, 356, 358, 359.

The Commission gave consideration to the interest rates the proposed securities should bear. Slip opinion, p. 13. There was a forecast of available income of $6,215,423 for annual charges in a future normal year. It was thought that this would support a capitalization of $155,000,000 plus, even though more than $35,000,000 of that represented by common stock participated only in earnings above the estimated normal except as to long range advantages from capital investments and bond sinking fund payments that had the effect of increasing the value of the common stock equities. 254 I. C. C. 15, 356. As appears from the tables of capitalization, annual charges and distribution of securities, slip opinion pp. 3–4, the interest rates chosen varied with the type of security. As none of the authorized securities are alleged by the debtor to have shown values much above par, the chosen rates of return have not proven to be excessive. See note 6, *infra*. From the various recommendations as to the proper interest for the new first mortgage bonds, the Commission selected finally a fixed rate of three per cent and a contingent rate of an additional one per cent.[2] 233 I. C. C. 537, 542, 554–5; 254 I. C. C. 15, 387. To guard against a drain upon the reorganized railroad if interest rates should fall, a provision appears in the plan [3] for refunding the authorized first mortgage bonds at a maximum premium of 5 per cent. This gives protection to the reorganized road if not to the unpaid creditors and excluded stockholders.

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[2] The earnings contingency which authorized the payment of the prior contingent interest, as expressed in technical detail at 254 I. C. C. 393–94, was the net income less certain fixed charges.

[3] 254 I. C. C. 387.

Much the same situation exists as to the Geneva Steel Plant. A discussion occurred before the District Court on October 23, 1942, in which it was recognized that the plant would make a substantial contribution to the traffic of the road. This was the basis for further consideration before approval by the Commission on its reconsideration of the plan, 254 I. C. C. 349, 356. The effect of the existence of this plant received further consideration in the Circuit Court of Appeals, 150 F. 2d 28, 34, 38, 43.

As we indicated above the alleged increases in the national income were briefed and decided contrary to the debtor's contention on the former review. Nothing was called to our attention in the former review to indicate that an increased level of economic activity above that in actual existence when the order of confirmation was issued had occurred beyond that anticipated by the Commission.[4] Earnings available for interest depend upon costs as well as upon revenue. It might be added to this Court's com-

[4] The national income[5] as reported in the annual publication of the Department of Commerce, The Survey of Current Business, for the following years was, in billions:

1940	77.6	1943	149.4
1941	96.9	1944	160.7
1942	122.2	1945	161.0

The national income as computed by the Department of Commerce is tentatively estimated at 164.0 billions for 1946; for 1947, no statement of an expected increase. See The Economic Report of the President to the Congress, of January 8, 1947, H. Doc. No. 49, 80th Cong., 1st Sess., as required under the Employment Act of 1946, 60 Stat. 23.

The Dow-Jones average of the ten first grade rails was 117.25 on June 10, 1946, but had fallen to 110.73 on December 30, 1946. The market bid for the first bonds of the reorganized debtor, when, as, and if issued was 101 on June 10, 1946, but had fallen to 89 on December 30, 1946. These latter figures are from the Commercial and Financial Chronicle, issues of June 10 and December 30, 1946.

[5] National income is the total net income earned in production by individuals or businesses.

ments on railroad rate increases, slip opinion, *supra*, p. 19, footnote 29, that in handing down its order of December 5, 1946, granting certain increases, the Interstate Commerce Commission considered the necessity of meeting the increased costs.[5]

The Commission made no finding that the cash value of the securities allocated to the senior creditors paid them in full. To justify the change of position of creditors from fully secured to partially secured, creditors were given opportunities to participate in profits through common stock ownership with a chance at larger earnings than the Commission's forecast anticipated. We held the priority rule was satisfied by this type of allocation. This was explained by our decision on the last review. Slip opinion, *supra*, p. 15. The debtor has made no allegation, either in this effort for re-examination or before, that the existing cash value of the securities allotted any creditor has ever aggregated the amount of the creditor's claim against the debtor.[6] We think the absence of such an

[5] While the reports of the Commission deal with the national railroad situation rather than with individual roads, an examination of them does not indicate that the Commission intended to supply by means of the increase in rates a net railway operating income sufficient to give a rate of return on invested capital substantially higher than for normal pre-war years. 264 I. C. C. 695, 722, 728; I. C. C., *Ex parte* No. 162, December 5, 1946, mimeographed report, p. 7.

See the discussion of increased revenue and costs, mimeographed report, *supra*, pp. 3, 4, 5.

[6] As far as they are readily available to us the ranges of the reorganized road's securities traded on a when, as and if issued basis have been as follows:

	1945		*1946*	
	High	Low	High	Low
First Bonds	103	82	102	89
Income Bonds	89½	44½	89	50
Prefered Stock			75½	37
Common Stock			35½	16

Bond ranges are from Year's End Edition of Moody's Bond Record, Vol. 14, No. 1, January 10, 1947; stock ranges are from Standard &

allegation, of itself, demonstrates that the plan is not, because of excessive interest, unfair to the debtor or those for whom it is allowed to appear.

Until it can be contended with some show of reasonableness that the creditors senior to the creditors and stockholders whom the debtor represents here have received more in value than the face of their claims, the debtor's insistence on a re-examination of the plan is without substantial support. See *Northern Pacific Ry. Co.* v. *Boyd*, 228 U. S. 482; *Group of Investors* v. *Milwaukee R. Co.*, 318 U. S. 523, 541.

Not only does the debtor fail to allege any actual sales or values of the securities which would show that the creditors have received through the allotted securities payments on their claims in excess of their face but there is no allegation of a radically improved situation as to this railroad's earnings available for interest.[7] Although dis-

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Poor's Earnings and Ratings Stock Guide, Year's End Edition, January, 1947.

The highest market bids on the securities so far this year are, so far as the figures are available to us:

First Bonds	89
Income Bonds	62
Preferred Stock	50
Common Stock	16½

From Commercial & Financial Chronicle, Editions of January 6, January 13, and January 20, 1947.

[7] The annual reports of the Trustees to stockholders show the income available for interest as follows:

1942	$17,044,420.39
1943	11,573,667.94
1944	8,157,880.25
1945	1,503,289.07 Dr.*

In 1946 the income available for all fixed charges at the end of eleven months was $3,405,118.00.

*This deficit is shown after deducting from gross earnings a tax accrual for prior years of $3,648,589.63 (in addition to the tax accrual for the year 1945) and $12,790,657.50 in amortization of war facilities.

tortions of income available for interest from varying causes do appear in the reports of the Trustees, available interest is an important figure as a basis for the consideration of capitalization. Traffic comparisons are not specifically set out.[8] While the allegations of a petition for re-examination into a confirmed railroad reorganization plan need not contain allegations of the primary facts, the allegations should allege ultimate facts, such as those just referred to, sufficient to indicate the factual basis for a re-examination. The allegations of changed conditions in this petition to the District Court do not have the specificity of those which caused this Court in 1932 to direct an injunction against a Commission order of 1930 that was based on hearings that antedated the depression, beginning in 1929.[9] The ruling in that case has not been extended to authorize the reopening of hearings before the Commission because of alleged changes in conditions. For cases of that type, this Court has pointed out, there must be a showing of substantial injury.[10] We have approved a statement that the *Atchison* case rested upon exceptional facts.[11]

To open a confirmed plan of railroad reorganization, assuming the power to do so, accepted after years of consideration, requires a showing by allegation of injustice to the complaining debtor or junior creditors far stronger

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[8] Revenue freight carloading weekly report of American Association of Railroads shows car loadings for the month of December for the years 1941 to 1946 as follows:

1941	14,045	1944	15,308
1942	16,915	1945	12,007
1943	14,571	1946	13,517

[9] *Atchison, Topeka & Santa Fe Railway Co. v. United States*, 284 U. S. 248, 256.

[10] *United States v. Northern Pacific Railway Co.*, 288 U. S. 490, 494.

[11] *Interstate Commerce Commission v. City of Jersey City*, 322 U. S. 503, 515.

than any here made. Compare *Pewabic Mining Co.* v. *Mason*, 145 U. S. 349, 356, 367; *Group of Investors* v. *Milwaukee R. Co.*, 318 U. S. 523, 543.

Much of what we have written is directed at the suggestion that there should be a plenary re-examination of reorganization proposals for the Denver & Rio Grande. As to that suggestion, we are of the opinion that the record affirmatively shows a proper basis for the valuation and allocation of securities by the Commission, slip opinion, pp. 3-4, and that the record fails to show any sound basis for a re-examination on account of changed circumstances between May, 1941, and June 10, 1946.

So far as the period since June 10, 1946, is concerned, there is no basis in this record or in anything judicially known to us for a conclusion that there has been a significant change in interest rates, earnings available for interest or traffic. Nor do we see that the action of Congress in passing S. 1253, on July 31, 1946, should persuade us to require a stay to await further enactments that might affect this reorganization. It was vetoed. President's Memorandum of Disapproval, August 13, 1946. Our understanding of our duties under the Railroad Reorganization Act, in the face of strong criticism of its provisions, was expressed in the former review of this plan, slip opinion, p. 9. It need not be repeated. We must continue to act under the now existing law. Whether or not changes may be made that will effect this reorganization, we do not know. It is quite understandable to us that stockholders strive to preserve the equities of their investments and that creditors should feel, in this case, that they have not recovered the value of their investment. Such convictions are to be respected.

The suggestion is made that there is a public interest in what persons or corporations hold in the future a controlling voice in the management of this railroad. This matter had the consideration of the Commission, 254

I. C. C. at 367 *et seq.* The plan adopted contains a ten year voting trust for the new stock with Commission regulated provisions for its sale. 254 I. C. C. at 400. The record does not present any ground for concluding that the new owners will be any the less solicitous for the public welfare than those who, at present, hold the stock certificates.

However, nothing before or since the confirmation of this plan indicates any disregard by the Commission or the courts of the interest of operators, stockholders, the creditors or the public. When the Interstate Commerce Commission finds the value of a railroad system by any means, the correctness of the result cannot be mathematically proved or disproved. The difficulties of appraisal are multiplied by the necessity of looking into the future to estimate earnings. Earnings estimates are made with allowance for changing economic conditions. So are interest rates. All this is recognized by everyone but the Commission has found no better way to determine the allocation of new securities among the various classes of stockholders or of creditors of a railroad with their different rights. Cf. *R. F. C. v. Denver & Rio Grande W. R. Co.*, Nos. 278–82, October Term, 1945, slip opinion, pp. 6–8.

The reorganization should be carried out. The order of the Circuit Judge in directing a stay of the consummation of the plan is vacated and the order of the District Judge of October 30, 1946, denying the petition is affirmed.

SUPREME COURT OF THE UNITED STATES

No. 690.—October Term, 1946.

Insurance Group Committee, Reorganization Committee, Guaranty Trust Company of New York, Trustee, et al., Petitioners,
v.
The Denver and Rio Grande Western Railroad Company, et al.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

[February 3, 1947.]

Mr. Justice Frankfurter, dissenting.

Formally, this is a litigation between private litigants, creditors quarreling over their share in the capitalization of a reorganized enterprise. Intrinsically, the case concerns issues of serious public importance. Control of one of the major railroad systems of the country is at stake. Disposition of the controversy brings into play considerations of policy on which the Congress and the President have clearly expressed themselves with relevance to the problem before the Court.

The peculiar and controlling public aspect of the case is emphasized by the position taken by the Government. The Government frequently intervenes as *amicus curiae* in so-called private litigation to present the dominant public aspects of such litigation. In the earlier stages of this litigation the Government was in fact a party of record. Through one of its agencies, the Reconstruction Finance Corporation, the Government is itself a creditor. When the plan for reorganization, now ordered to be carried out, was found by the Circuit Court of Appeals not "fair and equitable", and justifiably rejected by the general bondholders whose claims constituted about one-fourth of the entire debt of the railroad, the Government here

joined the present petitioners in urging reversal of that decision and approval of the plan. See 150 F. 2d 28, and 328 U. S. —. After such reversal here, the case went back to the District Court and the present proceedings were begun for re-examination of the plan. The District Court dismissed these proceedings, but an order by the Circuit Court of Appeals stayed the execution of the plan until the court had opportunity to consider an appeal duly docketed. When a petition for certiorari was filed here to lift the case out of the Circuit Court of Appeals before it could be heard, the Government no longer asked this Court to approve the plan which it had supported here last March. Instead, the Government bowed itself out of the case. What has happened to make the Government abstain from standing on the decision which it obtained here last June? That which has happened constrains me to the view that the Denver and Rio Grande reorganization plan calls for further scrutiny, and should not, as matters now stand, be carried out.

What has happened since this Court rendered its decision last June? The Government, in its memorandum of abstention, states it succinctly and with candor:

> "Because of the action of the Congress last Summer in passing the Bill known as S. 1253 and the reasoning of the President's Memorandum of Disapproval, dated August 13, 1946, both of which indicated disapproval of certain features of railroad reorganizations approved pursuant to the provisions of Section 77 of the Bankruptcy Act, which is the existing law, the RFC, as an agency of the United States created and existing by virtue of Congressional enactment, is not taking any position as to whether the petitions should be granted."

The decisive change in relevant circumstances, which thus caused a decisive change of position by the Government since the case was here originally, is the essential basis for the debtor-railroad's unsuccessful effort in the District

Court to secure re-examination of the reorganization plan, and was presumably the basis for the order of Judge Phillips in the Circuit Court of Appeals staying proceedings in the District Court to consummate the plan.

This controlling change in circumstances is dismissed by the Court with the observation that "the action of Congress in passing S. 1253 . . . was vetoed. President's Memorandum of Disapproval, August 13, 1946." But the decisive consideration is not that the President vetoed the bill but why he vetoed it. The President left no doubt regarding the grounds of his veto. In the interest of an adequate appreciation of them the full text of his Memorandum is made part of this opinion (Appendix I). The President did not veto the bill because he disapproved its purposes. He vetoed the bill because it was too weak, in some of its provisions, for carrying out those purposes. By withholding my signature to this bill" wrote President Truman, "I do not intend to indicate that I favor the pending reorganization plans. I am in agreement with those objectives of the bill which prevent undesirable control of the railroads, either immediately or within a few years, and which prevent forfeitures of securities." He continued: "I believe that the next Congress can pass a bill which will meet the stated objections and which will be in the best interests of the public, the railroads, the bondholders and other creditors, and the stockholders." These are not merely the views of the President of the United States. They are the views of a President with expert knowledge of the subject, gained through years of active participation in the most elaborate investigation of railroad reorganizations ever conducted by a congressional committee.

The President's veto statement elicited a prompt response from leaders of the Conference Committee out of which the vetoed bill came. They represented both Houses and both parties. The statement deserves quotation in full:

"Statement of Members of Congress Regarding Further Legislation

"The railroad reorganization bill, S. 1253, was the culmination of over 3 years of intensive effort to save $2,000,000,000 of investments made by hundreds of thousands of stockholders and junior bondholders in railroads now in process or reorganization under section 77 of the Bankruptcy Act. Those investments will be wiped out under pending plans of reorganization unless legislation is enacted to prevent it. This bill was designed and passed by the Congress primarily for that purpose.

"Those who have supported this legislation will be definitely heartened by the declaration of principles contained in the President's memorandum stating why he withheld his signature from the bill. For it is clear that the broad principles announced by the President are shared by the proponents and supporters of this legislation. Broadening of the bill to meet the requirements of the President's objections can and will be drafted. Such a bill will be promptly introduced at the next session of the Congress. As Congress has already overwhelmingly committed itself to such legislation and the President has declared that he, too, favors its purposes, the prompt enactment of such a measure appears certain.

"While this legislation was under consideration in the committees of the Senate and House; a number of courts and the Interstate Commerce Commission recognized the appropriateness of cooperating with Congress in meeting this public problem and abstained from taking steps which would have carried foward any of the pending reorganization plans under section 77. This was months before the legislation came up for a vote in either the Senate or House. Now that the legislation, both in the form in which it was reported by the respective committees of the Senate and House and in the subsequent form contained in the conference report was passed by an overwhelming vote in each Chamber and the objectives of the legislation have received the approbation of the President,

it is confidently hoped that the courts and the Commission will take no steps in support or furtherance of pending reorganization plans under section 77, but will instead await action by the Congress and the President on legislation giving effect to the principles favored by both.

CLYDE M. REED.
JAMES M. TUNNELL.
SAM HOBBS.
CHAUNCEY W. REED.

Washington, D. C.,
August 14, 1946."

It is difficult to believe that had the President signed S. 1253 this Court would have sustained the action of the District Court in dismissing out of hand the petition for re-examination of the reorganization plan. The considerations of public policy which underlay that measure could hardly have been disregarded, for the inequities of this very reorganization plan were extensively cited in Congress as demonstrating the need for correction. This would have been so although Congress did not see fit to withdraw entirely the further jurisdiction of the District Court in these reorganization proceedings. But the grounds of the President's veto only emphasize these considerations of public policy. They should prompt a court of equity to stay its hand until further scrutiny of the plan. The bi-partisan statement of the conference leaders underwrites the President's formulation of public policy. Of course, neither the President's hopes nor the confidence of congressional leaders insures legislation. But if the realization of the desires of the President and the expectations of bi-partisan Congressional leaders concerned with this legislation would affect, as I cannot believe it would not, the action of a court of equity when asked to enforce this reorganization plan, the Court ought not to proceed on the assumption that the legislation as outlined by the President will not be forthcoming.

We are dealing here not with an ordinary litigation as to which courts are exercising conventional judicial authority. The courts are carrying out the legislative mandate of Congress as to the considerations of public policy by which the role of the judiciary in railroad reorganization should be guided. The primary responsibility is lodged with an agency of Congress, the Interstate Commerce Commission. This Court's jurisdiction is at once very limited and novel. If legislation which would make it the duty of the Court to reconsider the reorganization plan now before us is really in prospect, only the most imperative public emergency should require this Court to engage in a race with the President and Congress in the disposition of questions of public policy. *Cf. Pennsylvania* v. *Wheeling and Belmont Bridge Co.*, 13 How. 518, and 18 How. 421.

Moreover, Congressional intention has not been latent and conjectural since last summer. Legislation, as suggested by the President, appears to have every prospect of prompt consideration in the new Congress. In submitting a joint bi-partisan resolution (see Appendix II of this opinion) dealing with railroad reorganizations, after referring to the President's Memorandum of Disapproval and the Statement of Members of Congress Regarding Further Legislation, *supra*, Senator Reed stated that

> "preliminary discussions have already been agreed to with Members of the House, with a view to expediting this legislation in the Eightieth Congress. It is hoped that it can be taken up, in a preliminary stage, with the White House so that the greatest possible speed can be secured for the legislation to be finally enacted in the Eightieth Congress."

The Court rightly assumes that neither this Court nor the District Court is concluded by what was decided here last June. Changed circumstances, of course, may require the re-examination of a plan by the Interstate Commerce Commission. First and last, this is a proceeding

in equity, and until a decree consummating a plan of reorganizaton is finally signed it is the duty of a court of equity not to make of itself an instrument of inequity. Peculiarly is this so where the paramount interest is that of the public, though the formal litigation is carried on by private parties. In such a situation we are not restricted to the specific claims of the formal litigants. We are not restricted to the limited specific financial factors which, in the debtor's opinion, have affected the situation since last June. The decisive issues are those posed by the Congress and the President. The real question before the Court is whether, in the light of events since its prior decision, there is a solid basis for the judgment which we are asked to enforce. To be sure, even in a court of equity a matter once adjudicated should not be relitigated even though the litigation is still open, as it always is until there is a final decree. Usually reconsideration of an interim determination because of "changed conditions" implies new events in nature. But new understanding of old facts or hitherto unexplored relevant facts may constitute the most significant kind of change in circumstances.

The essence of the matter before the Court is this. We are asked to give our imprimatur to a plan of far-reaching implications to the public interest, in that it concerns the control of one of the major railroad systems of the nation. That plan was born of the confused uncertainties of the war years, after a long period of incubation and many changes. Judgment often involves prophecy, and all prophecy has an element of guesswork. But guessing can be less rather than more. How much guesswork is involved in this plan has been candidly indicated by members of the Interstate Commerce Commission. To expect a "normal" period, in the sense of assured stability, for a good stretch ahead is doubtless to pursue a will-o'-the-

wisp. But the President's message pointed to factors to which certainly no adequate attention has thus far been paid in these proceedings.

The President spoke of the "evil, present in reorganizations under section 77, of permitting improper control of railroads after their reorganization." Repeatedly he referred to this vital aspect of the public interest, the protection of which requires "that reorganizations shall place control of railroads in persons primarily concerned with transportation for the communities served and for the nation as a whole, without any strings direct or indirect, conditional or otherwise, to institutions or others in distant financial centers."

Here is certainly a matter of prime relevance in ascertaining whether this reorganization plan should be given final judicial sanction. The control of this major railroad system is to pass into the hands of the so-called insurance group in New York and its two largest lending national banks. The directions in which insurance companies have in the past exerted their power over the railroads of the country are not calculated to give confidence in future control by them. The geographical and functional remoteness of powerful financial interests in New York, in relation to a railroad system operating in Colorado and Utah, bars that single-minded attentiveness and pioneering enterprise which characterized great railroad men like Edward H. Harriman, James J. Hill and Daniel Willard.

Another ground of President Truman's dissatisfaction with S. 1253 was its failure to deal adequately with the "grossly excessive interest rates now wasting the funds of the railroads in section 77 proceedings." To be sure, the Interstate Commerce Commission was not unmindful of the present low interest levels when it approved the 1943 reorganization plan. It is safe to say, however, that the significance of the sharp drop in interest levels has recently

been made more manifest and further inquiry would lay it bare.

Finally, the President seemed much concerned by needless forfeitures under reorganization plans. In all discussions in Congress, the plan before us was given as a conspicuous example. The avoidance of forfeitures does not involve large capitalizations. It is to be avoided in other ways, such as calling for tenders of bonds by bondholders and their purchase by court trustees at the below-par prevailing market prices.

On two of these important aspects of sound financing in railroad reorganizations, proper interest rates and what has been called "the painless reorganization of the railroad debt structure", (see speech of Senator Vandenberg, August 3, 1939, 76th Cong., 1st Sess., 84 Cong. Rec. 11127), the record here is slender indeed, if not barren.

Here are lines of crucial public interest to which the Congress and the President have called authoritative attention since the case was last here. These are matters on which the Court should satisfy itself on its own initiative whether or not private litigants have adequately presented them. The Court is not passing merely on specific issues framed by the parties or on the narrow claims on which the parties press for reconsideration. Abstractly, no one will reject what the President has called the principle that "reorganizations must give primary consideration to the public interest." But that public interest is in the keeping of the courts. It must be safeguarded by them without regard to the manner in which those who have also private interests represent the public interest.

And what consideration is more compelling than that this reorganization be re-examined by the Interstate Commerce Commission in the light of the vast changes of the transforming six years since the Interstate Commerce Commission closed its record in this case, particularly in light of the scrutiny which these reorganizations have re-

ceived from the Congress and the President since this Court last considered the case? There is no suggestion that the interests of the railroad, or the public that it serves, or its creditors, will suffer by the delay necessary to explore further these basic issues before turning its control over to distant financial institutions. No one has suggested that this railroad has not served the public effectively while under court control, or that it cannot continue to do so until full inquiry dissipates the heavy clouds of doubt resting over this reorganization. To be sure, the road has been in reorganization since 1935. But it took four years for the formulation of the first reorganization plan and another four to formulate the additional plans. What Judge Learned Hand recently said of another situation is here applicable: "there can be considerations more imperative than the despatch of judicial business, even after delays so long as existed in this case. If the legally protected interests of any opposing parties are fully preserved, it is not a good reason to deny others any reasonable chance to protect their own interests that they have been long in asserting them." *Knight* v. *Wertheim*, 158 F. 2d —. Surely the protection of the public interest in the special keeping of the Court is more imperative than the despatch of judicial business, and no legally protected interest of those to whom the financial control of this road has been awarded can possibly suffer by full inquiry as to whether the paramount public interest has been properly safeguarded.

APPENDIX I.

MEMORANDUM OF DISAPPROVAL.

I am withholding my approval of S. 1253, entitled "An Act to enable debtor railroad corporations, whose properties during a period of seven years have provided sufficient earnings to pay fixed charges, to effect a readjustment of their financial structures; to alter or modify their financial obligations; and for other purposes."

Even though I am familiar with the deficiencies and inequities and the evils that exist under section 77 of the present Bankruptcy Act, I fear that this new bill would not accomplish the purpose for which it was intended.

The bill contains two sections, the first of which contemplates the prevention of bankruptcy proceedings where practicable; the second contemplates the reorganization of certain railroad carriers by the institution of proceedings under section 1 of the bill for readjustment of their financial affairs.

Objections which I have to the bill include the following:

The bill fails to direct specifically the immediate reduction of the grossly excessive interest rates now wasting the funds of the railroads in section 77 proceedings. Millions of dollars per year can be saved at once for each of the railroads in section 77 proceedings by reducing the interest rates on their bonds and other debt down to the level of the interest rates paid by railroads not in section 77 proceedings. I reiterate a statement which I made in my message to Congress on the state of the Union which is as follows, "low interest rates will be an important force in promoting the full production and full employment in the post-war period for which we are all striving."

The bill does not adequately cure the evil, present in reorganizations under section 77, of permitting improper control of railroads after their reorganization.

The bill fails to provide full protection against forfeiture of securities and investments.

The level of fees and expenses in reorganization cases under section 77 has been excessive. This is not corrected in this bill. Affirmative provisions to curb this evil and to bring it under strict control should be included in any bill which may be enacted.

The bill excludes from its benefits certain railroads which should be brought within its provisions if it is to become law. In this regard it appears that the fifty million dollar limitation in section 2 of the bill would exclude some railroads for whose exclusion there appears to be no logical justification.

This bill fails to correct a serious abuse which I condemned in the course of the Senate railroad investigation. I refer to the abuse of diverting, under cover of a reorganization plan, the funds of a railroad for the purchase of its own stocks in the market.

On the other hand, the bill does incorporate principles for which I was one of the sponsors in the Senate. I commend particularly the emphasis which the bill places on the principle that reorganizations must give primary consideration to the public interest, and to the best interests of the railroads which are being reorganized.

This requires among other things that reorganizations shall place control of railroads in persons primarily concerned with transportation for the communities served and for the nation as a whole, without any strings direct or indirect, conditional or otherwise, to institutions or others in distant financial centers.

Such regard for the public interest will also help the stockholders, whether they be railroad employees who have invested in the stocks of the companies for which they work, or ordinary investors, desirous of safeguarding their investment, but not of helping any interest to capture control of their railroad. These stockholders, whom

the bill justly seeks to protect against forfeiture, can and should get such protection, but without enabling any financial interest to use such legislation to acquire control.

By withholding my signature to this bill I do not intend to indicate that I favor the pending reorganization plans. I am in agreement with those objectives of the bill which prevent undesirable control of the railroads, either immediately or within a few years, and which prevent forfeitures of securities.

I believe that the next Congress can pass a bill which will meet the stated objections and which will be in the best interests of the public, the railroads, the bondholders and other creditors, and the stockholders.

HARRY S. TRUMAN

THE WHITE HOUSE,
August 13, 1946.

APPENDIX II.

(S. Res. 65, 80th Cong., 1st Sess., Jan. 22, 1947, Cong. Rec. p. 543.)

Whereas many railroads in the continental United States are in the hands of receivers and trustees because of insolvency proceedings brought under section 77 of the Bankruptcy Act, or through equity court procedure; and

Whereas the mileage of these railroads is approximately forty thousand, and the investment in road and equipment amounts to several billion dollars; and

Whereas many of these roads entered bankruptcy in 1933, 1934, 1935, or 1936, 10 to 14 years ago, and the earnings of these roads in recent years have been sufficient to accumulate large cash amounts, and have placed such roads in a solvent position; and

Whereas, according to the best information available, court proceedings involving some very important railroads are in such a condition that it is difficult if not impossible to approximate the time when reorganization under section 77 will be completed, and it is feasible for a number of these roads to retire part of their indebtedness, at a discount, and to refund or extend the maturity date of the balance of their indebtedness, and it further appears desirable to discharge such railroads from bankruptcy proceedings without the necessity of drastic reorganizations under section 77; and

Whereas the continued holding of roads that have become solvent in trustee or receiver operation as insolvent roads, and further efforts to reorganize, under section 77, railroads which no longer need such reorganization, are contrary to the general public interest and contrary to sound public policy; and

Whereas the President of the United States has joined with Congress in going on record in favor of modifications of present reorganization legislation and in favor of the principles proposed by the appropriate committees of the Senate and House of Representatives in 1946, and in favor of the principles enacted by Congress in 1946, and the President has further urged the strengthening of such proposals and the adoption of further provisions to carry out those general principles: Therefore be it

Resolved, That the Committee on Interstate Commerce of the Senate is authorized and directed either as a committee, or through a duly constituted subcommittee, to make an investigation of the conditions surrounding the operation and handling of said railroads by trustees and receivers through the period of receivership or trusteeship; to ascertain the extent to which there should be elimination or reduction of any of the exceptions heretofore proposed to legislation on this subject; to inquire into the causes for the failures, (a) to reduce the interest rates of

railroads in receivership and bankruptcy proceedings; (b) to arrange for the reduction of the rates of interest payable by such railroads on their outstanding indebtedness; (c) to arrange for the refunding and extension of maturity dates of part or all of the indebtedness of such railroads while in the hands of the courts; (d) to call for the tender of bonds and the purchase of bonds of such railroads either at a discount or otherwise, by the receivers or trustees, out of funds in their hands; (e) to discharge such railroads from court proceedings without the necessity of being subjected to drastic reorganization under section 77 of the Bankruptcy Act; and (f) to return such railroads to their owners as promptly as possible; to investigate the fees paid trustees, receivers, counsel, bankers or bank syndicates, committees and experts, and any and all matters relating thereto, and to ascertain the methods of reducing reorganization expenses and the possibility of eliminating, by discharge of railroads without further reorganization proceedings under section 77, the necessity for any further reorganization expenses under elaborate and therefore costly reorganization proceedings; to ascertain what legislative methods can be provided to enable railroads now undergoing reorganization to obtain management local to their lines of operation and to the communities, shippers, and passengers they serve, and to enable the owners of such railroads to secure control free from domination by interests which have not received the affirmative and express vote of the security holders subsequent to reorganization; to ascertain what voluntary methods and steps additional to those proposed in legislation adopted by the Seventy-ninth Congress on this subject will be useful in expediting the discharge of railroads from costly bankruptcy and reorganization proceedings without the necessity of drastic reorganizations under section 77, and to permit reorganization by voluntary proceedings in a businesslike manner and on a businesslike basis; to ascertain what

methods and procedures, additional to those provided in legislation passed by the Seventy-ninth Congress on this subject, will be useful for the protection of railroad employees and other investors in the stocks of the railroads. The committee is directed to report to the Senate as early as practicable, with such recommendations as to changes in existing law as may be found desirable.

For the purposes of this resolution, the committee, or any duly authorized subcommittee thereof, is authorized to hold such hearings, to sit and act at such times and places during the sessions, recesses, and adjourned periods of the Eightieth Congress, to employ such clerical and other assistants, to require by subpena or otherwise the attendance of such witnesses and the production of such correspondence, books, papers, and documents, to administer such oaths, to take such testimony, and to make such expenditures, as it deems advisable. The cost of stenographic services to report such hearings shall not be in excess of 25 cents per 100 words.